TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

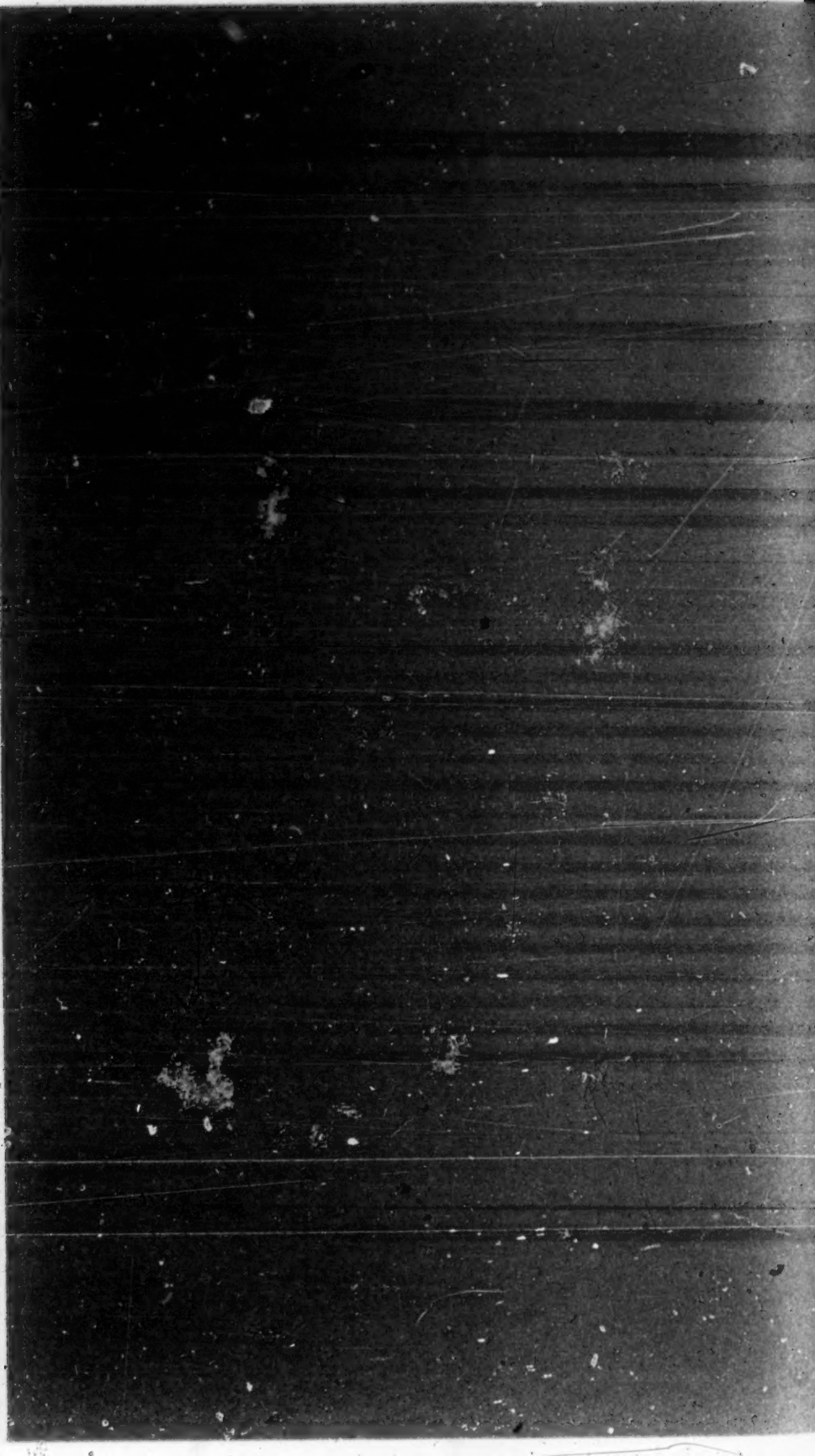
WALTER SCHILLING, PETITIONER,

vs.

WILLIAM P. ROGERS, ATTORNEY GENERAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 18, 1959
CERTIORARI GRANTED OCTOBER 26, 1959



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING, PETITIONER,

vs.

WILLIAM P. ROGERS, ATTORNEY GENERAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 14, 1959

[fol. 1] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM P. ROGERS, Attorney General, Appellant,

v.

WALTER SCHILLING, Appellee.

No. 14723

Appeal from the United Sta District Court for the District of C

JOINT APPENDIX—Filed January 30, 1959

Dallas S. Townsend, Assistant Attorney General, George B. Searls, Irwin A. Seibel, Sharon L. King, Attorneys, Department of Justice, Attorneys for Appellant.

[fol. 3]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOCKET ENTRIES

1784—'58

Action for Judicial Review of Federal Agency Action.

WALTER SCHILLING

v.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian

Isadore G. Alk, 1026 Woodward Bldg., Dallas S. Townsend, George B. Searls, Victor R. Taylor, Sharon L. King, Attorneys, Department of Justice.

Jury demand

Report Judgment

Date	Account	Received	Disbursed
1958			
July 8	Alk	$10.00	
July 8	U.S. Treasury		$10.00

[fol. 4]

Date	Proceedings
1958	
July 8	Complaint, appearance
July 8	Summons, copies (1) and copies (1) of Complaint issued deft. ser. 7-10-58; U.S. Atty. ser. 7-8-58.
July 17	Motion of deft. to dismiss; P&A c/m 7-17-58; appearance of Dallas S. Townsend, George B. Searls, Victor R. Taylor, Sharon L. King, M.C. 7-17-58.
July 18	Stipulation of counsel extending time for filing P&A in opposition to motion to dismiss to and including 8-18-58 m/n.
Aug. 14	Points and Authorities of pltff. in opposition to deft's motion to dismiss.
Sept. 29	Supplementary memorandum of deft
Sept. 29	Memorandum of pltff. in reply to defts' supplementary memorandum.
Oct. 8	Order denying motion of deft. to dismiss complaint. Curran, J. (N).
Oct. 10	Notice of Appeal by deft; Exhibit; copy mailed to Isadore G. Alk, 1026 Woodward Bldg.
Oct. 10	Motion of deft. to transmit original papers on appeal, "So ordered" Pine, J.
Nov. 6	Order of USCA allowing an appeal on motion to dismiss and that notice of appeal submitted by applicant be filed and record transmitted to USCA by clerk of District Court within forty days.
Nov. 6	Notice of Appeal of deft, per order USCA copy mailed to Isadore C. Alk, 1026 Woodward Bldg.

A true copy:

Test: 11-14-58.

Harry M. Hull, Clerk, By L. McKeever, Deputy Clerk.

[fol. 5]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

1784—58

WALTER SCHILLING, Address: Am Deich 17, Bremen-Borgfeld, Germany, Plaintiff,

v.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian, Address: Washington, D.C., Defendant.

COMPLAINT FOR JUDICIAL REVIEW OF FEDERAL AGENCY ACTION —Filed July 8, 1958

1. Jurisdiction over the matter here in controversy and the power to act as prayed for herein is vested in this Court by reason of the provisions of Section 10 of the Administrative Procedure Act (60 Stat. 243, Act of June 11, 1946, 5 U.S.C. Sec. 1009), and the Federal Declaratory Judgment Act, as amended August 28, 1954, c. 1033, 68 Stat. 890, 28 U.S.C.A., Sec. 2201.

2. At all the times hereinafter mentioned prior to May 24, 1949, plaintiff was a resident and citizen of Germany, and at all the times hereinafter mentioned since said date plaintiff was and still is a resident and citizen of the Federal Republic of Germany.

3. The defendant, William P. Rogers, is the duly appointed, qualified and acting Attorney General of the United States and as such is successor to the Alien Property Custodian and is charged with the duty of administering property vested pursuant to the Trading With the Enemy Act, as amended, by Executive Order No. 9788 of October 14, 1946, 11 F.R. 11981, and by Reorganization Plan 1, of 1947, Section 101, 12 F.R. 4534.

4. By Vesting Order No. 97, effective August 17, 1942, the then Alien Property Custodian and one of the prede-

cessors in office of the defendant, vested 82 shares of G. Bruning Tobacco Extract Co., Inc., as property of the Estate of Mrs. G. Schilling, deceased, of Bremen, Germany.

[fol. 6] 5. By Vesting Order No. 10203, effective December 8, 1947, the then Alien Property Custodian and one of the predecessors in office of the defendant, vested an obligation of one A. DeWitt Alexander and 570 shares of Pacific Lighting Corporation and accrued dividends thereon as property of plaintiff.

6. By Vesting Order No. 12172, effective October 20, 1948, the then Alien Property Custodian and one of the predecessors in office of the defendant, vested a certain debt of the Lynchburg Trust & Savings Bank, Lynchburg, Virginia, as property of the representatives and heirs of Mrs. G. Schilling, deceased.

7. Prior to and on the dates of the issuance of Vesting Orders Nos. 97 and 12172, plaintiff, as an heir of Mrs. G. Schilling, deceased, was the owner of an interest in the property vested thereby.

8. The property vested by the aforesaid Vesting Orders Nos. 97, 10203 and 12172 has heretofore been liquidated and the sum of $68,537.26 represents the plaintiff's share of the proceeds thereof.

9. Effective on October 15, 1946 by Executive Order No. 9788, the Office of Alien Property Custodian was terminated and all the authority, rights, privileges, powers, duties and functions vested in such Office or in the Alien Property Custodian or transferred or delegated thereto were vested in or transferred or delegated to the Attorney General of the United States to be administered by him or under his direction and control by such officers and agencies of the Department of Justice as he may designate, and the defendant, William P. Rogers, as such Attorney General of the United States is successor to the Alien Property Custodian and is charged with the duty of administering property vested pursuant to the Trading With the Enemy Act, as amended, by said Executive Order No. 9788, 11 F.R. 11981, and by Reorganization Plan 1, of 1947, Section 101, 12 F.R. 4534.

10. On August 8, 1946, the Congress of the United States amended section 32(a)(2)(D) of the Trading With the Enemy Act, 40 Stat. 411, 50 U.S.C. App. Section 1, by providing that a return of vested property may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or [fol. 7] subject, discriminating against political, racial or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation, and provided that such return is in the interest of the United States (Act of August 8, 1946, c. 878, Section 2, 60 Stat. 930).

11. The provisions of Section 32(a)(2)(D) as amended by the Act of August 8, 1946, as aforesaid, do not permit the Alien Property Custodian or the defendant, as Attorney General, any discretion in the determination of the eligibility or qualification of a former owner of vested property for the return of such property or the proceeds thereof, but only permits the Alien Property Custodian and the defendant, as Attorney General, discretion in making a return of vested property to the former owner thereof once the eligibility or qualification of such former owner has first been affirmatively determined.

12. Plaintiff was denied admission to the practice of law, which was a substantial deprivation of his rights as a German citizen, because he was a known opponent of Nazism and considered politically unreliable, and Anti-Nazis or Non-Nazis such as plaintiff were recognized and treated as a political group by Nazi authorities and under Nazi laws.

13. On or about July 26, 1948, plaintiff deeming himself eligible and qualified for a return of vested property under said Section 32(a)(2)(D) duly filed with the then Alien Property Custodian his Notice of Claim in such form and containing such particulars as by the then Alien Property Custodian and by law required, praying for the release and return of his interest in the property vested pursuant to the aforesaid Vesting Orders Nos. 97, 10203, and 12172.

14. Thereafter a hearing was conducted in accordance with the Rules of Procedure for Claims of the Office of Alien Property (8 CFR Part 502) before Harry R. Hinkes, Hearing Examiner, in the Office of Alien Property and the question presented at said hearing was whether the plaintiff was eligible for a return of the vested property under said Section 32(a)(2)(D) as a person who failed to enjoy full rights of German citizenship throughout the period of hostilities as a result of German laws, decrees or regu- [fol. 8] lations discriminating against political, racial or religious groups.

15. Thereafter and on May 31, 1957, the Hearing Examiner rendered his decision concluding that plaintiff failed to enjoy full rights of German citizenship during the period of hostilities as a consequence of German laws, decrees or regulations discriminating against a political group, i.e., those who rejected an invitation to join the Nazi Party and that plaintiff is eligible for the return of vested property under said Section 32, and recommending to the Director, Office of Alien Property, that plaintiff's claim be allowed.

16. On April 2, 1958, the Director, Office of Alien Property, rejected the Hearing Examiner's aforesaid recommendation, determined that plaintiff was not a member of a political group that was discriminated against and concluded that plaintiff does not qualify for return of the vested property under said Section 32 and accordingly disallowed plaintiff's claim.

17. The decision of the Director, Office of Alien Property, misconceived and was not in accordance with and short of the applicable law and was illegal and erroneous in that there was no legal substantial evidence on the record as a whole to support said decision, and was unreasonable, arbitrary and capricious and in express disregard of the object and purpose of Congress to make eligible for the return of vested property those former owners who failed to enjoy full rights of citizenship throughout the period of hostilities as a result of laws of their governments discriminating against political groups.

18. Thereafter and in accordance with Section 502.23 of the Rules of Procedure for Claims of the Office of Alien Property, a copy of the decision of the Director, Office of Alien Property, the record before the Hearing Examiner, and the exceptions and briefs filed with the Director were transmitted by him to the defendant, as Attorney General.

19. On or about April 10, 1958, the defendant, as Attorney General, determined not to undertake a review of the decision of the Director, Office of Alien Property, disallowing plaintiff's claim, and thereupon the decision of the Director, Office of Alien Property, became final and plaintiff has exhausted his administrative remedies.

[fol. 9] 20. The refusal of the defendant, as Attorney General, to undertake a review of the decision of the Director, Office of Alien Property, rejecting the Hearing Examiner's recommendations and disallowing plaintiff's claim is not only a serious injury to plaintiff but has created an actual controversy between plaintiff and the defendant as to plaintiff's eligibility and qualification for a return of plaintiff's share in the vested property under Section 32(a)(2)(D) of the Trading With the Enemy Act.

21. Should the decision of the Director, Office of Alien Property, which the defendant, as Attorney General, refused to review and for whom the Director, Office of Alien Property, was authorized to, and did, act in such decision, be and remain final and should this Court fail to grant the relief as prayed for herein, the purposes of Congress as expressed in said Section 32(a)(2)(D) will be circumvented and destroyed.

22. No Federal Statute precludes judicial review of the aforesaid Agency action.

Wherefore, the plaintiff respectfully prays that this Court:

(1) Review the decision of the Director, Office of Alien Property, disallowing plaintiff's claim and the action of the defendant, as Attorney General, in sustaining said decision;

(2) Adjudge and declare that plaintiff is eligible and does qualify for the return of his share of the vested property;

(3) Hold unlawful and reverse and set aside the decision of the Director, Office of Alien Property, disallowing plaintiff's claim;

(4) Direct the defendant, as Attorney General, to determine whether or not a return to the plaintiff of his share in the vested property is in the interest of the United States;

(5) Award plaintiff such other and further relief in the premises as to the Court may seem just in the premises; and

[fol. 10] (6) Award costs.

Dated July 8, 1958.

Isadore G. Alk, 1026 Woodward Building, Washington 5, D.C., Henry I. Fillman, 120 Broadway, New York 5, New York, Attorneys for Plaintiff

Katz & Sommerich, 120 Broadway, New York 5, New York, Of Counsel.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1784—58

[Title omitted]

MOTION TO DISMISS—Filed July 17, 1958

The defendant moves to dismiss the complaint on the grounds that the Court does not have jurisdiction of the claim or cause of action stated therein, because such claim or cause of action is based on Section 32 of the Trading with the Enemy Act, and administrative action under said Section is not subject to judicial review or control.

Dallas S. Townsend, Assistant Attorney General, Director, Office of Alien Property; George B. Searls, Victor R. Taylor, Sharon L. King, Attorneys, Department of Justice, Washington, D.C., Attorneys for Defendant.

[fol. 11]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1784—58

[Title omitted]

ORDER DENYING MOTION TO DISMISS—October 8, 1958

This cause came on to be heard on the defendant's motion to dismiss the complaint and was argued by counsel, and due consideration thereof having been had, it is hereby

Ordered, adjudged, and decreed, that said motion to dismiss be and hereby is denied.

And the Court is of opinion that this Order involves a question of law, as to the jurisdiction of the Court to review a decision by the Director of the Office of Alien Property (and the Attorney General) that a claimant is not eligible for a return of property under Section 32 of the Trading with the Enemy Act, which is controlling in this cause, that there is substantial ground for difference of opinion thereon, and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation.

Edward M. Curran, United States District Judge.

October 8, 1958.

[fol. 12]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1784—58

[Title omitted]

NOTICE OF APPEAL—Filed October 10, 1958

Notice is hereby given that defendant, William P. Rogers, Attorney General of the United States, and Successor to the Alien Property Custodian hereby appeals to the United States Court of Appeals for the District of Columbia Cir-

cuit from the order of this Court entered on October 8, 1958 in favor of plaintiff against said defendant denying defendant's motion to dismiss. Attached hereto is a copy of defendant's petition for leave to appeal filed this day in the United States Court of Appeals for the District of Columbia Circuit.

Dated: October 10, 1958.

Dallas S. Townsend, Assistant Attorney General; George B. Searls, Victor R. Taylor, Sharon L. King, Attorneys, Department of Justice, Washington 25, D.C., Attorneys for Defendant.

To: Isadore C. Alk, 1026 Woodward Building, Washington 5, D.C.

[fol. 12A]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958, District Court
Civil Action No. 1784—58

No. 14723

WILLIAM P. ROGERS, Attorney General, Applicant,

v.

WALTER SCHILLING, Respondent.

Before Wilbur K. Miller, Bazelon and Burger, Circuit Judges, in Chambers.

ORDER ALLOWING APPEAL—November 3, 1958

Upon consideration of the application for an appeal from an interlocutory order of the District Court, and it appearing that respondent consents, it is

Ordered by the court that an appeal from the order of the District Court entered herein October 8, 1958, denying the motion to dismiss, is hereby allowed.

It is further ordered by the court that the notice of appeal submitted by the applicant to the District Court be filed and that the record on appeal be transmitted to this court by the clerk of the District Court within forty days.

Per Curiam.

Dated November 3, 1958.

[fol. 12B]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1784—58

WALTER SCHILLING, Plaintiff,

v.

WILLIAM P. ROGERS, Attorney General, Defendant.

NOTICE OF APPEAL—Filed November 6, 1958

The United States Court of Appeals for the District of Columbia Circuit having granted on November 3, 1958, defendant's petition for leave to appeal, the said defendant, William P. Rogers, Attorney General of the United States and Successor to the Alien Property Custodian, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order of this Court entered on October 8, 1958 in favor of plaintiff against defendant denying defendant's motion to dismiss.

Dated: November 6, 1958.

Dallas S. Townsend, Assistant Attorney General; George B. Searls, Victor B. Taylor, Sharon L. King, Attorneys, Department of Justice, Washington 25, D.C., Attorneys for Defendant.

To: Isadore C. Alk, 1026 Woodward Building, Washington 5, D.C.

[fol. 31] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,723

WILLIAM P. ROGERS, Attorney General of the United States, Appellant,

v.

WALTER SCHILLING, Appellee.

Appeal from the United States District Court for the District of Columbia

---

Mr. George B. Searls, Attorney, Department of Justice, with whom Mr. Irwin A. Seibel and Miss Sharon L. King, Attorneys, Department of Justice, were on the brief, for appellant. Mr. Victor R. Taylor, Attorney, Department of Justice, also entered an appearance for appellant.

Mr. Henry I. Fillman of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, with whom Messrs. Isadore G. Alk and Otto C. Sommerich were on the brief, for appellee.

OPINION—Decided May 21, 1959

Before Edgerton, Fahy and Washington, Circuit Judges.

Per Curiam: This is an alien property case. Plaintiff-appellee, a German national, applied to the Attorney Gen- [fol. 32] eral for relief under Section 32 of the Trading With the Enemy Act,[1] claiming to be a persecuted person within the scope of the first proviso of Section 32(a)(2)

---

[1] Added by 60 Stat. 50 (1946), as amended, 50 U.S.C. App. § 32 (1952), as amended, 50 U.S.C. App. § 32 (Supp. V, 1958).

(D).[2] The Attorney General, after hearing, found that plaintiff was not within the class intended to be benefited by that proviso, and refused to return plaintiff's vested property. Plaintiff then brought suit in the District Court, praying an adjudication of eligibility under the proviso. The Government moved to dismiss, and the District Court denied the motion. An interlocutory appeal was allowed under the provisions of 28 U.S.C.A. § 1292(b) (Supp. 1958).

Though this is not a direct attempt to compel the return of vested alien property, it is an effort to obtain judicial determination of a preliminary issue of a sort committed by Congress to agency discretion. As such, it is forbidden by Section 7(c) of the Act, and reliance cannot be placed on other legislation having no specific application to alien property, such as the Declaratory Judgment Act[3] and the Administrative Procedure Act.[4] See *McGrath* v. *Zander*, 85 U.S. App. D.C. 334, 177 F. 2d 649 (1949); [fol. 33] *Legerlotz* v. *Rogers*, —— U.S. App. D.C. ——, —— F. 2d —— (1959), and cases there cited. The complaint must be dismissed for lack of jurisdiction.

Remanded.

---

[2] . . . *Provided*, That notwithstanding the provisions of this subdivision return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation . . ."

[3] 28 U.S.C.A. § 2201 (Supp. 1958).

[4] 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-09 (1952).

[fol. 34] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,723

C. A. 1784-58

WILLIAM P. ROGERS, Attorney General of the United States, Appellant,

v.

WALTER SCHILLING, Appellee.

Appeal from the United States District Court for the District of Columbia

Before Edgerton, Fahy and Washington, Circuit Judges.

JUDGMENT—May 21, 1959

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the complaint for lack of jurisdiction.

Per Curiam.

Dated: May 21, 1959.

[fol. 36] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 37]

SUPREME COURT OF THE UNITED STATES

No. 319, October Term, 1959

WALTER SCHILLING, Petitioner,

vs.

WILLIAM P. ROGERS, Attorney General.

ORDER ALLOWING CERTIORARI—October 26, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary calendar and set for argument immediately preceding No. 213.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING,

Petitioner,

WILLIAM P. ROGERS, Attorney General,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISADORE G. ALK,
1026 Woodward Building,
Washington 5, D. C.

HENRY I. FILLMAN,
OTTO C. SOMMERICH,
120 Broadway,
New York 5, N. Y.

Attorneys for Petitioner

INDEX

CASES CITED

STATUTES CITED

MISCELLANEOUS CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

WALTER SCHILLING,

Petitioner,

v.

WILLIAM P. ROGERS, Attorney General.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Walter Schilling, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the judgment of that court made and entered in this case on May 21, 1959 which reversed an order of the District Court for the District of Columbia denying the Attorney General's motion to dismiss the complaint and remanded the case with directions to dismiss the complaint for lack of jurisdiction (R. 34).

Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 31) has not yet been reported. A copy thereof is set forth in the Appendix, *infra*, page 20. The District Court rendered no opinion.

Jurisdiction

The date of the judgment of the Court of Appeals for the District of Columbia Circuit sought to be reviewed is May 21, 1959, and said judgment was entered on May 21, 1959. A copy thereof is appended hereto in the Appendix, *infra*, page 22.

The Act of June 25, 1948 c. 646, 62 Stat. 928, 28 U.S.C. § 1254(1), 28 U.S.C.A. § 1254(1), confers on this Court jurisdiction to review said judgment of the Court of Appeals for the District of Columbia Circuit by writ of certiorari.

Questions Presented

1. Whether the charge in the complaint, which is admitted by the Attorney General's motion to dismiss, that the decision of the Director of the Office of Alien Property (and the Attorney General) finding that the petitioner, a "technical" enemy during World War II, is ineligible to be considered for return of vested property under §§ 32(a)(2)(D) and 32(a)(5) of the Trading with the Enemy Act was illegal, without substantial evidence on the record to support it, arbitrary and capricious, presents a justiciable controversy within the jurisdiction of the District Court for the District of Columbia.

2. Whether the District Court for the District of Columbia has jurisdiction under the Declaratory Judgment Act, the Administrative Procedure Act, or under the grant of federal-question jurisdiction to the District Courts of a suit to review and set aside a decision of the Director of the Office of Alien Property (and the Attorney General) finding that the petitioner does not qualify under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act for return of vested property, which decision is admitted by the Attorney General's motion to dismiss to be

illegal, without substantial evidence on the record to support it, arbitrary and capricious.

3. Whether the petitioner's suit in the District Court to review and set aside the decision of the Director of the Office of Alien Property (and the Attorney General) finding that petitioner is not within a class of persons eligible for return of vested property under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act is forbidden by the fourth paragraph of § 7(c) of said Act which provides that the "sole relief and remedy" of any person having any claim to vested property "shall be that provided by the terms of this Act."

The Statutes Involved

The statutes which the case involves are

(1) the Trading with the Enemy Act, approved October 6, 1917, 40 Stat. 411, as amended, 50 U.S.C. App. § 1 *et seq.*, 50 U.S.C.A. App. § 1 *et seq.*, particularly § 2, 40 Stat. 411, the fourth paragraph of § 7(c) which was added thereto by the Act of November 4, 1918 c. 201, 40 Stat. 1020, § 9(a), 40 Stat. 419, § 32, added thereto by the Act of March 8, 1946, c. 83, 60 Stat. 50 and as amended by the Act of August 8, 1946, c. 878, § 2, 60 Stat. 930, and § 39, which was added thereto by the Act of July 3, 1948, c. 826, § 12, 62 Stat. 1246;

(2) the Declaratory Judgment Act, as amended August 28, 1954, c. 1033, 68 Stat. 890, 28 U.S.C. § 2201 (Supp. V), 28 U.S.C.A. § 2201;

(3) Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009, 5 U.S.C.A. § 1009; and

(4) Act of June 25, 1948, c. 646, 62 Stat. 930, 28 U.S.C. § 1331, 28 U.S.C.A. § 1331, in effect at the

time of the commencement of petitioner's suit on July 8, 1958 and prior to July 25, 1958, when Section 1, Public Law 85-554, 72 Stat. 415, which increased the requisite jurisdictional amount, was approved.

The relevant provisions of the statutes are set forth in the Appendix, *infra*, pages 23-30.

Statement of the Case

The action was brought to review a decision of the Director of the Office of Alien Property (and the Attorney General) that petitioner is not eligible to receive a return of vested property under § 32(a)(2)(D) of the Trading with the Enemy Act.

The jurisdiction of the District Court was invoked under § 10 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. § 1009, 5 U.S.C.A. § 1009, and the Federal Declaratory Judgment Act, as amended August 28, 1954, c. 1033, 68 Stat. 890, 28 U.S.C. § 2201, 28 U.S.C.A. § 2201 (R. 5).

The complaint (R. 5) alleges, in substance, the following:

Petitioner has always been a resident and citizen of Germany. By three vesting orders, effective respectively August 17, 1942, December 8, 1947 and October 20, 1948, the then Alien Property Custodian seized certain property in which petitioner had an interest. The vested property has been liquidated and $68,537.26 represents petitioner's share of the proceeds.

On August 8, 1946, Congress amended § 32(a)(2)(D) by providing that vested property may be returned to an individual who, although a citizen and resident of Germany during World War II, did not enjoy full rights of German citizenship as a consequence of a German law, decree or regulation discriminating against political, racial or religious groups, and such return is also determined to

be in the interest of the United States as required by § 32(a)(5).

The provisions of § 32(a)(2)(D), as so amended, do not permit the Alien Property Custodian or the Attorney General, who is charged with the duty of administering vested property, any discretion in determining eligibility for return of such property, but only permit discretion in making a return to the former owner once eligibility or qualification has first been affirmatively established (R. 7).

Petitioner was denied admission to the practice of law, which was a substantial deprivation of his rights as a German citizen, because he was a known opponent of Nazism and considered politically unreliable, and Anti-Nazis or Non-Nazis such as petitioner were recognized and treated as a political group by Nazi authorities and under Nazi laws (R. 7).

On or about July 26, 1948, deeming himself eligible and qualified for return of vested property under § 32(a)(2)(D) petitioner filed his claim for return; that thereafter a hearing was conducted in the Office of Alien Property before a Hearing Examiner, and the question presented at the hearing was whether petitioner was eligible for return of vested property under § 32(a)(2)(D).

The Hearing Examiner rendered a decision concluding that petitioner was eligible for the return of vested property because he failed to enjoy full rights of German citizenship during the period of hostilities as a consequence of German laws, decrees or regulations discriminating against a political group and recommended allowance of the claim (R. 8). (A copy of the decision is appended hereto in the Appendix, *infra*, p. 31.)

The Director of the Office of Alien Property rejected the Hearing Examiner's recommendation, determined that petitioner was not a member of a "political group" that was discriminated against within the meaning of § 32(a)

(2)(D), and concluded that he was ineligible for return of the vested property. He accordingly disallowed the claim (R. 8). (A copy of the Director's decision is appended hereto in the Appendix, *infra*, p. 40.) The Attorney General decided not to review and thereupon the Director's decision became final administratively (R. 8).

The complaint specifically alleges in paragraph 17 (R. 8) that the Director's decision

> "misconceived and was not in accordance with and short of the applicable law and was illegal and erroneous in that there was no legal substantial evidence on the record as a whole to support said decision, and was unreasonable, arbitrary and capricious and in express disregard of the object and purpose of Congress to make eligible for the return of vested property those former owners who failed to enjoy full rights of citizenship throughout the period of hostilities as a result of laws of their governments discriminating against political groups."

It is further alleged that petitioner has exhausted his administrative remedy, that there is an actual controversy between him and the Attorney General as to petitioner's eligibility for a return under § 32(a)(2)(D), that should the Director's decision remain final the purpose of Congress as expressed in said section will be circumvented and destroyed and that no statute precludes judiciai review of the decision (R. 8, 9).

The complaint sought a decree setting aside the Director's decision as unlawful, adjudging that petitioner is eligible for the return of his vested property, and directing the Attorney General to determine whether or not a return of the property to petitioner is in the interest of the United States (R. 9).

The Attorney General moved to dismiss the complaint on the ground that the District Court does not have juris-

diction to review administrative action under § 32 (R. 10). The District Court denied the motion (R. 11). An interlocutory appeal was allowed under the provisions of Public Law No. 85-919, approved September 2, 1958, 72 Stat. 1770, 28 U.S.C. § 1292(b), 28 U.S.C.A. § 1292(b) (R. 12a).

Reasons Relied On for the Allowance of the Writ

1. The questions presented are of fundamental importance to the proper administration of § 32 of the Trading with the Enemy Act.

John Ward Cutler, associate general counsel, Office of Alien Property Custodian, who testified on July 1, 1946, before the Subcommittee of the Committee on the Judiciary of the United States Senate, 79th Cong., 2d Sess., which then had before it S. 2039, to amend §32(a), and S. 2378, to amend the First War Powers Act, 1941, 55 Stat. 838, pointed out to the Subcommittee (Hearings p. 12) that it was intended by the proposed amendment to release vested property "in the case of victims of Axis oppression who were deprived of life or civil rights by discriminatory legislation against *political*, racial, or religious *groups* in the country * * * of which they were nationals", and that it was intended by the proposed amendment to release vested property where the former owner thereof "opposed the Nazi cause" and was, in fact, persecuted by the Germans, but that by the proposed amendment "there will be no return to anybody who was in fact in favor of the Nazi cause". (Emphasis supplied)

In Senate Report No. 600, 82d Cong., 1st Sess. (1951) on S. 1748 the purpose of the first proviso of § 32(a)(2)(D) is expressed in the following language (at p. 2):

> "On August 8, 1946, the Congress of the United States, by enactment of an amendment to section 32(a)(2) of the Trading With the Enemy Act, sought to provide for the release of property vested in the Alien

Property Custodian, where it was apparent that the former owner of the assets was an individual who 'was deprived of life or substantially deprived of liberty pursuant to any law, decree or regulation • • • discriminating against political, racial, or religious groups • • •', in an enemy country.

"By this amendment a necessary and clear-cut distinction was effected between the property of those individuals who were in fact our enemies in the last war, and those who by their extreme persecution at the hands of their governments were the 'enemies of our enemies' and our own allies."

The same statement is found on page 1 of Senate Report No. 784, 81st Cong., 1st Sess., on S. 603 (1949), which contains the following (at p. 4):

"The general approach incorporated in this proposed legislation represents also the only humanitarian one and the only realistic one possible in view of the extraordinary experiences of these persecuted groups over the last 15 years and the extraordinary present-day needs of the survivors. *These victims of persecution*, it should be remembered, *were treated as a group or 'community'* • • •. Indeed, their property was taken by the United States because they were part of a large political group (i.e., enemy nationals). *To refuse to treat them as a group or community when* there is a possibility of their receiving aid and to emphasize their individuality only when it becomes a barrier to receiving a benefit *is an injustice which the Government of the United States should be avid to avoid.*" (Emphasis supplied)

The Deputy Director of the Office of Alien Property has stated that:

". . . Under [section 32] . . . enemy citizens who had been persecuted for political, racial or religious

reasons could have their former property returned to them." (Hearings before the Subcommittee to Investigate the Administration of the Trading with the Enemy Act of the Senate Committee on the Judiciary, 83rd Cong., 1st Sess., p. 104.)

If a decision of ineligibility for return under the first proviso of § 32(a)(2)(D) made by the Director and the Attorney General illegally, without substantial evidence to support it and otherwise arbitrary or capricious, is immune from judicial review, then the Director and the Attorney General in the administration of claims under § 32 are in a position to nullify the Congressional intent in enacting the first proviso of § 32(a)(2)(D). Indeed, the Attorney General recognizes the great importance of the questions presented, for in his application to the Court of Appeals for permission to appeal from the order of the District Court, the Attorney General stated as follows (R. 17, 18):

"The question of jurisdiction to review administrative decisions under Section 32 is of great importance to the administration of the Trading With the Enemy Act. A granting of the application and an early disposition of the appeal will advise the Attorney General as to his authority over claims still pending in the Office of Alien Property for the return of property under Section 32, some 4,000 in number, and will also advise him as to the chances of additional litigation. "Since Section 32 was added to the Act in 1946, approximately 12,000 claims for the return of property have been disposed of administratively, the great majority under Section 32. • • • Under the Regulations claims may be disposed of in summary proceedings or after hearings. Thousands of claims have been dismissed or disallowed for the reason that the claimant was held to be ineligible under the provisions of Section 32 for return. Hundreds of claims have drawn in question the construction and application of the

> 'persecution' provisions of Section 32(a)(2)(D), which are the basis for the present suit, * * *."

Manifestly, a determination of the questions presented for review will advise the Director and the Attorney General whether arbitrary and capricious determinations of ineligibility for return under § 32 are immune from judicial review and thereby guide them in the determination of a large body of similar claims now pending.

2. The Court of Appeals has decided important questions of federal law involving the construction of federal statutes which have not been, but should be, authoritatively settled by this Court.

§ 10 of the Administrative Procedure Act, which was enacted on June 11, 1946, provides that, except so far as statutes preclude judicial review, or agency action is by law committed to agency discretion, any person "suffering legal wrong" because of any agency action shall be entitled to judicial review thereof.

The report of the Senate Judiciary Committee on the Act, S. Rep. No. 752, 79th Cong., 1st Sess., reprinted in S. Doc. No. 248, 79th Cong. 2d Sess., at page 185, defines "legal wrong," as used in § 10(a), in the following language, at page 212:

> "* * * The phrase 'legal wrong' means such a wrong as is specified in subsection (e) of this section."

The report of the House Judiciary Committee, H. Rep. No. 1980, 79th Cong., 2d Sess., 233, reprinted in S. Doc. No. 248, 79th Cong., 2d Sess., in referring to § 10(a), states:

> "* * * The phrase 'legal wrong' means such a wrong as is specified in Section 10(e)."

§ 10(e) specifies as unlawful any agency action, findings or conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or unsupported by substantial evidence.

When the bill which became the Administrative Procedure Act was under consideration in the Senate on March 12, 1946, the following colloquy took place between Senators Donnell and Austin and Senator McCarran, one of the sponsors of the bill, who was explaining its provisions on behalf of the Senate Judiciary Committee (S. Doc. No. 249, *supra*, pp. 310-311):

"Mr. Donnell (referring to § 10)—

"It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?

"Mr. McCarran. Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

* * * * *

"Mr. Donnell. But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims that there has been an abuse of that discretion. Is that correct?

"Mr. McCarran: It must not mean arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning.

"Mr. Austin. And is it not also true that, because of the situation in which we are at this moment, this

bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?

"Mr. McCarran. That is true; the Senator is entirely correct in his statement."

Manifestly, in the context of the legislative history of the Act, any agency action which is illegal, unsupported by substantial evidence, arbitrary and capricious, is a "legal wrong."

Indeed, a statement of the Attorney General appended to the Senate Report as Appendix B, reprinted in S. Doc. No. 248, *supra*, page 230, states that any person "suffering legal wrong because of any agency action • • • shall be "entitled to judicial review of such action", and that this "reflects existing law", referring to the *Chicago Junction Case*, 264 U. S. 258, as a case having an important bearing on this subject.

In view of the Attorney General's admission by the motion to dismiss of the charge in the complaint that the determination of the Director of the Office of Alien Property that the petitioner is ineligible to be considered for return of vested property was illegal, arbitrary and capricious, and without substantial evidence on the record as a whole to support it, it is clear that the Attorney General concedes that the petitioner has suffered a "legal wrong" thereby within the meaning of Section 10(a) of the Act.

Thus, the Act clearly authorizes judicial review as to the validity of the Director's decision, and Section 10(b) of the Act authorizes such review by an action for a declaratory judgment. Whether the Director applied the legislative standard for eligibility for return of vested property set forth in the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act, whether he acted within the authority conferred, whether there was sub-

stantial evidence to support his decision and whether the decision is arbitrary or capricious or otherwise not in accordance with applicable law, are questions for judicial decision, especially where, as here, the findings of the Hearing Examiner and the Director as to the petitioner's eligibility for return are in conflict. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474; In re *United Corporation*, 249 F. 2d 168 (C. A. 3). See, also, *Estep* v. *United States*, 327 U. S. 114; *Stark* v. *Wickard*, 321 U. S. 288; *Federal Radio Commission* v. *Nelson Bros., B. & M. Co.*, 289 U. S. 266, 276-277; *Fleming* v. *Moberly Milk Products Co.*, 82 U. S. App. D. C. 16, 160 F. 2d 259, 265.

In discussing the Administrative Procedure Act, Mr. Justice Jackson, in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 40-41, said:

> "The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities.
>
> "Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear."

Under §§ 32(a)(2)(D) and 32(a)(5) of the Trading with the Enemy Act, vested property may be returned to an individual who, although a citizen and resident of Germany during World War II, did not enjoy full rights of citizenship under a law, decree or regulation of Germany discriminating against political groups, whenever such return is in the interests of the United States. Thus, the authority to exercise discretion as to whether a return of vested property to the former German owner is in the

interests of the United States, depends upon such individual's status as a person eligible for return.

Manifestly, there are two stages in the administrative process under § 32 of the Trading with the Enemy Act. The first stage is one whereby the Director must make a determination as to whether a claimant comes within a class of persons eligible for return under the first proviso of § 32(a)(2)(D). The second stage is one whereby, after having first determined that a claimant is eligible, the Director must determine under § 32(a)(5) whether a return of the vested property to the claimant is in the interest of the United States. The first stage is not discretionary. The second stage is discretionary. However, the Court of Appeals was of the opinion that the first stage is "committed by Congress to agency discretion".

Assuming for the discussion, but without conceding, that the first stage of determining that a claimant comes within a class of persons made eligible by the first proviso of § 32(a)(2)(D) is discretionary, § 10(e) of the Administrative Procedure Act makes manifest that a determination of non-eligibility for return is reviewable for it is there provided that agency action may be held unlawful and be set aside if not only arbitrary, capricious and without substantial evidence to support it, but also for "an abuse of discretion or otherwise not in accordance with law."

Furthermore, the terms of § 32 of the Trading with the Enemy Act do not clearly, convincingly and unmistakably express an intent to preclude judicial review of the Director's decision and, therefore, judicial review under the Administrative Procedure Act is not precluded by the first exception of § 10 of that Act.

In the report of the Senate Judiciary Committee, S. Rep. No. 752, 79th Cong., 1st Sess., reprinted in S. Doc. No. 248, 79th Cong., 2d Sess., at page 212, the following is found with respect to § 10 of the Administrative Procedure Act:

> "Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent

the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board."

The same statements appear in H. Rep. No. 1980, 79th Cong., 2d Sess., reprinted in S. Doc. No. 248, *supra*, at page 275. This report then states the following:

"* * * To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review."

Congressman Walter, one of the House sponsors of the Act, in explaining its various provisions, said on the floor of the House on May 24, 1946 (S. Doc. 248, *supra*, at p. 368):

"Two general exceptions are made in the introductory clause of section 10. The first exempts all matters so far as statutes preclude judicial review. Congress has rarely done so. Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial—see *Stark* v. *Wickard* (321 U. S. 288 at p. 317).

"The second general limitation on the section is that there are exempted matters to the extent that they are by law committed to the absolute discretion of administrative agencies. There have been much misunderstanding and confusion of terms respecting the discretion of agencies. They do not have authority in any case to act blindly or arbitrarily. They may not wilfully act or refuse to act. Although like trial

courts they may determine facts in the first instance and determine conflicting evidence, they cannot act in disregard of or contrary to the evidence or without evidence. They may not take affirmative or negative action without the factual basis required by the laws under which they are proceeding. Of course, they may not proceed in disregard of the Constitution, statutes or other limitations recognized by law."

Since the Act of August 8, 1946, c. 878, § 2, 60 Stat. 930, which added the first proviso to § 32(a)(2)(D) of the Trading with the Enemy Act, was enacted some two months after the Administrative Procedure Act became law, the failure of Congress to provide explicitly in § 32 that agency action thereunder should not be reviewed in any court is a clear indication that Congress did not intend to exclude judicial review of agency action under § 32(a)(2)(D) which is not in accordance with the applicable law, is not supported by substantial evidence, and is unreasonable, arbitrary and capricious.

Notwithstanding the foregoing, the Court of Appeals held that judicial review of the decision of the Director (and the Attorney General) that petitioner is not within a class of persons eligible for return of vested property under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act is forbidden by the fourth paragraph of § 7(c) of said Act, which provides that "the sole relief and remedy" of any person having any claim to vested property "shall be that provided by the terms of this Act" and, therefore, the decision is not reviewable under the Administrative Procedure Act and the Declaratory Judgment Act.

But the Court of Appeals failed to recognize that § 7(c) refers only to the remedy provided by § 9(a) of the Trading with the Enemy Act, which authorizes a suit to recover vested property by non-enemies and, since this is not a suit to recover vested property, § 7(c) does not preclude judicial review of the finding and decision with respect to

the *status* of petitioner, a "technical" enemy who is ineligible to bring suit under § 9(a), as a person eligible under § 32(a)(2)(D) to be considered for return in accordance with § 32(a)(5).

Moreover, the Court of Appeals overlooked that, although the words "relief and remedy" in § 7(c) signify a means of redressing a wrong, the Trading with the Enemy Act does not afford petitioner a remedy to review the Director's illegal, arbitrary or capricious action, and gave no consideration to § 10(c) of the Administrative Procedure Act which provides that

> "Every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

Since petitioner is a "technical" enemy, he has no remedy under § 9(a) of the Trading with the Enemy Act, which may be availed of only by non-enemies, and, since no adequate remedy is afforded him under the Trading with the Enemy Act to review the Director's determination that he is not eligible under § 32(a)(2)(D) to receive a return of his vested property, it is clear that § 10(c) of the Administrative Procedure Act affords him a judicial review of such determination.

3. The Court of Appeals had decided federal questions in a way in conflict with applicable decisions of this Court.

The decisions of this Court in *Leedom* v. *Kyne*, 358 U. S. 184, 190; *Harmon* v. *Brucker*, 355 U. S. 579, 581-582; *Stark* v. *Wickard*, 321 U. S. 288, 310, and *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 277, seem to have been ignored by the Court of Appeals. They sustain the jurisdiction of a federal court to review the decision of a Government agency which is illegal, unsupported by substantial evidence, arbitrary or capricious, or otherwise in excess of delegated powers.

The Attorney General by the motion to dismiss admitted the charge in the complaint that the Director's determina-

tion was illegal, unsupported by substantial evidence on the record as a whole to support it, arbitrary and capricious (*The Chicago Junction Case*, 264 U. S. 258, 262, 265). This admission presents a justiciable controversy within the jurisdiction of the District Court. (*United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 429, 431; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.

The decisions in these cases should have required the Court of Appeals to hold that the District Court has jurisdiction of the suit.

The decisions of this Court in *Perkins* v. *Elg*, 307 U. S. 325 and *McGrath* v. *Kristensen*, 340 U. S. 162, also seem to have been ignored by the Court of Appeals. They are authority for the proposition stated by Mr. Justice Reed in *Kristensen*, as follows (p. 169):

> "Where an official's authority to act depends upon the status of the person affected, in this case eligibility for citizenship, that status, when in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies.
>
> * * * * * *
>
> "* * * As such a controversy over federal laws, it is within the jurisdiction of federal courts, 28 U.S.C. § 1331, 28 U.S.C.A. § 1331, and the terms of the Declaratory Judgment Act, 28 U.S.C. § 2201, 28 U.S.C.A. § 2201."

These decisions should have required the Court of Appeals to hold that this case presents an actual controversy over federal law which is within the jurisdiction of the District Court and may be determined by a declaratory judgment, for here, too, the Director's authority under § 32(a) of the Trading with the Enemy Act, to return vested property "depends upon the status of" the petitioner, namely, "eligibility" for return.

Furthermore, in resting its decision on § 7(c) of the Trading with the Enemy Act, the Court of Appeals dis-

regarded the decisions of this Court in *Becker Steel Co. of America* v. *Cummings*, 296 U. S. 74; *Central Union Trust Co.* v. *Garvin*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239, 245-246; *Guessefeldt* v. *McGrath*, 342 U. S. 308, 318, and *Societe Internationale, etc.* v. *Rogers*, 357 U. S. 197, 211.

These decisions and the provision of § 7(c) that the "sole relief and remedy" of any person having any claim to vested property "shall be that provided by the terms of this Act" relate to property whose seizure and ultimate retention was not authorized by the Act and for whose recovery by a non-enemy an express statutory remedy was provided by § 9(a) of the Act. Nothing in them appears to preclude a person, ineligible under § 9(a) to sue for the recovery of vested property because he is an enemy, but eligible for the return of such property under the first proviso of § 32(a)(2)(D), from seeking judicial review of an admittedly illegal, arbitrary or capricious administrative determination of ineligibility under the first proviso of § 32(a)(2)(D) and for which no other remedy is available under the Trading with the Enemy Act.

4. In view of the foregoing, review by this Court of the judgment of the Court of Appeals would be in the interest of the law and in its exposition and enforcement.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ISADORE G. ALK,
1026 Woodward Building,
Washington 5, D. C.

HENRY I. FILLMAN,
OTTO C. SOMMERICH,
120 Broadway,
New York 5, N. Y.

Attorneys for Petitioner.

Appendix.

1. Opinion of the Court of Appeals for the District of Columbia Circuit.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,723

WILLIAM P. ROGERS,
Attorney General of the United States,
Appellant,

v.

WALTER SCHILLING,
Appellee.

Appeal from the United States District Court
for the District of Columbia

Decided May 21, 1959

Mr. George B. Searls, Attorney, Department of Justice, with whom *Mr. Irwin A. Seibel* and *Miss Sharon L. King,* Attorneys, Department of Justice, were on the brief, for appellant. *Mr. Victor R. Taylor,* Attorney, Department of Justice, also entered an appearance for appellant.

Mr. Henry I. Fillman of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom *Messrs. Isadore G. Alk* and *Otto C. Sommerich* were on the brief, for appellee.

Before EDGERTON, FAHY and WASHINGTON, Circuit Judges.

PER CURIAM: This is an alien property case. Plaintiff-appellee, a German national, applied to the Attorney

Appendix

General for relief under Section 32 of the Trading With the Enemy Act,[1] claiming to be a persecuted person within the scope of the first proviso of Section 32(a)(2)(D).[2] The Attorney General, after hearing, found that plaintiff was not within the class intended to be benefited by that proviso, and refused to return plaintiff's vested property. Plaintiff then brought suit in the District Court, praying an adjudication of eligibility under the proviso. The Government moved to dismiss, and the District Court denied the motion. An interlocutory appeal was allowed under the provisions of 28 U.S.C.A. § 1292(b) (Supp. 1958).

Though this is not a direct attempt to compel the return of vested alien property, it is an effort to obtain judicial determination of a preliminary issue of a sort committed by Congress to agency discretion. As such, it is forbidden by Section 7(c) of the Act, and reliance cannot be placed on other legislation having no specific application to alien property, such as the Declaratory Judgment Act[3] and the Administrative Procedure Act.[4] See *McGrath* v. *Zander*, 85 U. S. App. D. C. 334, 177 F. 2d 649 (1949); *Legerlotz* v. *Rogers*, —— U. S. App. D. C. ——, ——F. 2d —— (1959), and cases there cited. The complaint must be dismissed for lack of jurisdiction.

Remanded.

---

[1] Added by 60 Stat. 50 (1946), as amended, 50 U.S.C. App. § 32 (1952), as amended, 50 U.S.C. App. § 32 (Supp. V, 1958).

[2] ". . . *Provided*, That notwithstanding the provisions of this subdivision return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation . . ."

[3] 28 U.S.C.A. § 2201 (Supp. 1958).

[4] 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-09 (1952).

2. Judgment of the United States Court of Appeals for the District of Columbia Circuit.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,733

September Term, 1958

WILLIAM P. ROGERS, Attorney General of the United States, Appellant, v. WALTER SCHILLING, Appellee.	C.A. 1784-58 United States Court of Appeals for the District of Columbia Circuit Filed May 21, 1959 Joseph W. Stewart Clerk

APPEAL from the UNITED STATES DISTRICT COURT for the DISTRICT OF COLUMBIA.

Before: Edgerton, Fahy and Washington, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the order * * * of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the complaint for lack of jurisdiction.

Per Curiam.

Dated: May 21, 1959.

3. Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. § 1, *et seq.*:

§ 2. **Definitions**

The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * * *

§ 7. * * *

* * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property

thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter covered, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * *

§ 9. **Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover**

(a) Any person not an enemy or ally of the enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the pay-

ment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United

States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * * *

§ 32. **Return of property**—(a) Conditions precedent The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the

provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation: * * *

* * * * *

(5) that such return is in the interest of the United States.

* * * * *

§ 39. * * *

(a) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act * * *.

4. The Declaratory Judgment Act, as amended August 28, 1954, c. 1033, 68 Stat. 890, 28 U.S.C., § 2201 (Supp. V):

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court

of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

5. § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C., § 1009.

§ 1009. **Judicial review of agency action.**

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable.

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review.

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statu-

tory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

6. Act of June 25, 1948, c. 646, 62 Stat. 930, 28 U.S.C. § 1331, 28 U.S.C.A., § 1331:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Appendix

7. Hearing Examiner's Decision.

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

OFFICE OF ALIEN PROPERTY

In the Matter of: WALTER SCHILLING Title Claim No. 37310	Docket No. 56 T 85

RECOMMENDED DECISION OF HARRY R. HINKES,
HEARING EXAMINER

This is a proceeding for the return of vested property arising out of a claim filed pursuant to the Trading With the Enemy Act, as amended (50 U.S.C. Appx. 1-40) and conducted in accordance with the Rules of Procedure for Claims (8 CFR Part 502).

By Vesting Order No. 97, effective August 17, 1942, there were vested 82 shares of G. Bruning Tobacco Extract Co., Inc., as property of the estate of Mrs. G. Schilling, deceased, Bremen, Germany. By Vesting Order No. 10203, effective December 8, 1947, an obligation of one A. DeWitt Alexander and 570 shares of Pacific Lighting Corporation and accrued dividends were vested as property of Walter Schilling, claimant herein. By Vesting Order No. 12172, effective October 20, 1948, there was vested a certain debt of the Lynchburg Trust & Savings Bank, Lynchburg, Virginia, as property of the representatives and heirs of Mrs. G. Schilling, deceased. The vested property has been liquidated and the sum of over $68,000 represents claimant's share of the accounts. The claim is therefore, an excepted claim within the meaning of section 502.2(h) of the Rules.

Pursuant to notice a hearing was held before me at which Richard P. Lott, Esq., represented the Chief of the Claims Section. Henry T. Fillman, Esq., of Katz & Sommerich, New York City, appeared for claimant. The only oral testimony was that of an attorney, M. Magdalena Schoch, an employee of this Office, called as a witness by the claimant with respect to her personal knowledge of conditions in Germany. The rest of the record is documentary. Briefs were filed by both parties.

PROPOSED FINDINGS OF FACT

1. Claimant, Walter Schilling, was born in Bremen, Germany, in 1910 and has always been a citizen and resident of Germany.

2. Claimant was the owner of the claimed property immediately prior to its vesting.

3. Claimant has never been a member of the Nazi Party or of any of its affiliates. On the contrary, he was an opponent of Nazism and known as such.

4. The Weimar Constitution of 1919 declared the equality of all citizens and made all German citizens eligible for public office in Germany "without distinction." These civil servants were "servants of the whole community, not of a party."

5. Under the Nazis, various laws were promulgated destroying the political freedom of public officials such as judges and making their appointment conditional upon their complete support of Nazism. This support could be expressed obviously by membership in the Party or in one of its affiliates. Political reliability was substituted for technical competence as the standard for civil service.

Similar political tests were applied by government examiners to applicants seeking admission to the bar.

6. Only one political party was recognized by the German government under the Nazis, the Nazi Party. The reconstruction of dissolved, or the formation of new, political parties and even attempts at such activities were treated as treason. The Nazi administration regarded all who were not Nazis as ineligible for public office and the practice of law.

7. Claimant received a law degree from the University of Munich in 1934 and thereafter served as a Referendar (apprentice) in the courts of Bremen until 1939 when he became eligible to take his final examinations for admission to the legal profession.

8. Claimant knew that Nazi allegiance was a prerequisite for admission to the legal profession. Nevertheless he refused to support the Nazi movement and rejected an invitation to become a member of the Nazi Party. As a consequence, he was not considered politically reliable.

9. Claimant took his final examinations in 1939 before the Chairman of the Examining Board, a prominent Nazi who would not pass any non-Nazi applicant. Claimant failed to pass. Claimant was informed by this chairman that claimant would find no position if claimant did not cooperate with the Nazis, because claimant had placed himself outside the community of the German people. Claimant, nevertheless, refused to change his position.

10. Claimant took a second entrance examination in 1940 before another Board Chairman and passed, but was told he could not hope for a career without party membership.

11. Claimant, knowing that he would not be licensed to practice law or be accepted for public service without party membership, obtained a job as a legal assistant or clerk in a Bremen law firm. In 1942 he went to work for a German industrial firm in a legal capacity where he continued until the end of the hostilities. Claimant then, for the first time, applied for admittance to the bar and was admitted to practice in Bremen as a lawyer.

PROPOSED CONCLUSIONS

The only issue in this proceeding is claimant's eligibility for a return of the claimed property under section 32 of the Act. Claimant, being a German citizen present in Germany throughout the war, must show that he failed to enjoy full rights of citizenship throughout the period of hostilities as a result of German laws discriminating against political, racial or religious groups. *In the Matter of Kashiro Maeda,* Title Claim No. 45628, Docket No. 1343, February 3, 1954.

In substance this claim proceeds upon the argument that claimant was denied admission to the practice of law, which was a substantial deprivation of his rights as a citizen; that this denial was due to his being non-Nazi (or anti-Nazi); that non-Nazis (or anti-Nazis) were recognized and treated as a political group by the Nazi authorities and under Nazi laws.

It is conceded by the Claims Section that Walter Schilling was not a member of the Party or any of its affiliates and that this status precluded his admission to the Bremen bar. It is argued, however, that the denial of this profession's practice was not a deprivation of a right of citizenship, but merely a denial of a privilege accorded members of the Nazi Party and, therefore, not a basis for a finding of eligibility under § 32(a)(2)(D). Cf. *In the Matter of*

Hermann Winter, Title Claim No. 45960, Docket No. 56 T-37, decision of the Hearing Examiner dated May 24, 1956, adopted July 25, 1956. In that case, I held that a schoolteacher's dismissal for his non-membership in the Nazi Party was not a denial of a "right due generally qualified individuals" but merely a loss of privileges extended only to Party members and followers. In the instant claim, however, unlike the *Winter* claim, the record makes it clear that, before the Nazis came into power, claimant had a *constitutional right* to be eligible for public office as a judge or licensed for the private practice of law regardless of political belief. The practice of law was no mere privilege. The Supreme Court of this country has ruled that the practice of law is not a matter of the State's grace; a person cannot be prevented from practicing except for valid reasons. *Schware* v. *Board of Bar Examiners of the State of New Mexico,* 25 Law Week 4276 (1957). The purport of Articles 109, 118, 128, 129, *et al.* of the German Weimar Constitution is certainly similar. The Nazis destroyed that right as well as the right to be eligible for public office which was also made dependent upon the applicant's politics. This change in rights was a substantial loss to the German citizen. It is futile to argue that the Nazis created this condition by the enactment of a law. That law, by its destruction of political freedom and by its discrimination against nonconforming political beliefs is entitled to no more credit and support from us than are the notorious Nazi confiscatory decrees which discriminated against the German Jew, which decrees German courts have repudiated as "in contradiction with natural law," "immoral," "contrary to the fundamental principles of any lawful-state order." See *1 Sueddeutsche Juristen Zeitung col. 36* (1946); *2 Sueddeutsche Juristen Zeitung col. 257, 262* (1947); *8 Neue Juristische Wochenschrift 905* (1955) and

discussion by Domke, *American-German Private International Law*, page 51 *et seq.* I cannot give Nazi legalism a morality and dignity which our courts usually accord the acts of another government. Any Nazi attempt, albeit by semblance of legislation, to diminish a constitutional right for invalid, discriminatory reasons should not be upheld. See No. 296, 20 *Dept. State Bull.* 592 (1949); *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (1954).

It is not sufficient, however, that claimant failed to enjoy full rights of citizenship pursuant to German law; to recover, claimant must show that the deprivation was pursuant to a law which discriminated against political, racial or religious groups. The totalitarian laws which impaired or destroyed the German constitutional rights were universal in scope. If the civil rights lost under the Nazis were to be regarded as the sole basis for eligibility residence in Nazi Germany would automatically qualify one for return. Cf. *Matter of Maeda, supra.* Congress intended but a cautious and limited program of return for certain German *minorities.* See House Hearings on H. R. 5089, 79th Cong., 2d Sess. p. 81. A claimant's denial of civil rights, *discriminatorily*, was made the test and measure of eligibility.

To meet this issue, claimant argues that he and the others who *refused to support* the Nazi Party, unlike the bulk of the German population, were barred from private practice and public office. They were not just non-members of the Party. Such description would include perhaps 90% of the German population, since Party membership was limited to about one-tenth of the population. Department of State, *National Socialism*, page 45 (1943). This claim does not require a conclusion that mere non-members be deemed a persecuted political group. It suggests, however, that those who were expected and invited to be Nazi

Party members but who refused to join be considered a political group. The membership of such a group was necessarily a very small minority of the population. The Nazis considered them "politically unreliable" and regarded them as having segregated themselves from the rest of the community. The Nazis punished them as a group by disqualifying them from the legal profession. Unlike the loss of religious freedom which was experienced by all Germans, this deprivation was imposed upon a small minority of Germans, i.e., those who refused to support Nazism. Cf. *Matter of Hannah von Bredow,* Title Claim No. 42152, Docket No. 54 T 70, decision of the Hearing Examiner dated February 28, 1956. Claimant cites Mr. Peyton Ford, then Assistant to the Attorney General, who said in 1948, that the

> ". . . groups who will benefit from the proposed amendment are the very groups who were regarded as enemies by the countries against which this country went to war. . . . In the imposition of persecution, they were treated as groups. (Sen. Rep. No. 784 on S. 2764, Appendix H, p. 12)

Claimant argues, therefore, that this Office should also treat them as a group. In this respect, claimant's position is not in disagreement with the definition of "group" in Webster's New International Dictionary, 2d Edition (1944):

> "An assemblage of persons or things regarded as a unit because of their comparative segregation from others."

Since the group described by claimant was persecuted for its political behavior, claimant contends that this Office must regard it as a political group.

Claimant continues by suggesting a more liberal reading of § 32. He cites the testimony of the Deputy Director of this Office that

> . . . Under [section 32] . . . enemy citizens who had been persecuted for political, racial or religious *reasons* could have their former property returned to them. (Hearings, Administration of the Trading with the Enemy Act, 83rd Cong., 1st Sess., p. 104.) (Emphasis added)

This language is repeated in the Final Report of the Subcommittee, page 6. Claimant points to the indisputable fact that he was persecuted for political *reasons*, even if such persecution was not directed against a political *group* and seeks to recover because the former was the real intent of the legislation. He cites, *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284; *People of Puerto Rico* v. *Shell Co.*, 302 U. S. 253; *Rector, etc. of Holy Trinity Church* v. *United States*, 143 U. S. 457, *Markham* v. *Cabell*, 326 U. S. 404 and *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, to the effect that we are not always confined to a literal reading of a statute in construing it, but may and should consider its object and purpose so as to effectuate rather than destroy its spirit and force which the legislature intended to enact.

The arguments of the claimant appear quite persuasive to me. The Chief of the Claims Section, however, contends that the Director has already considered these arguments and rejected them in the *Matter of Walter Lutz*, Title Claim No. 42142, Docket No. 55 T 75, decision of the Hearing Examiner dated September 30, 1955, pet. for rev. den. April 2, 1956. In that case, the Hearing Examiner found that a German physicist who was anti-Nazi was refused a civil service teaching position because he was not a member of the Party or of its affiliates. These circumstances alone were found insufficient to base a find-

ing of a political group within the meaning of § 32. In the present case, claimant was offered Party membership. He declined although he knew he would be disqualified from practicing his profession. However "large and amorphous" (to use the langauge in the *Matter of Mathilde Dietrich*, Title Claim No. 37849, Docket No. 1645, decision of the Director dated August 11, 1955) the group of non-Nazis and anti-Nazis were, the group of Germans who were offered the "privilege" of Party membership but who had the moral courage to reject the invitation even where such rejection labelled the rejector as "politically unreliable" must necessarily have been quite small. For that reason I do not believe the *Lutz* decision to be controlling.

I, therefore, conclude that:

1. Claimant, Walter Schilling, was resident within Germany on and after December 7, 1941.

2. Claimant is not entitled to the return of vested property under § 9 of the Act.

3. Claimant failed to enjoy full rights of German citizenship during the period of hostilities as a consequence of German laws, decrees or regulations discriminating against a political group, i.e., those who rejected an invitation to join the Nazi Party.

4. Claimant is eligible for the return of vested property under § 32 of the Act.

ACCORDINGLY, I recommend that Title Claim No. 37310, Docket No. 56 T 85 be allowed.

HARRY R. HINKES,
Harry R. Hinkes,
Hearing Examiner.

Dated: May 31, 1957.

8. Decision of Director, Office of Alien Property.

* * * * *

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

OFFICE OF ALIEN PROPERTY

WASHINGTON, D. C.

In the matter of WALTER SCHILLING	Claim No. 37310 Docket No. 56 T 85

DECISION OF DIRECTOR

This claim, which is for the return of the proceeds of vested property totalling approximately $68,000, is before me with a recommendation by the Hearing Examiner for allowance under section 32(a)(2)(D) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 32(a)(2)(D). A review of the record in this case compels me to reject the Examiner's recommendations and to disallow this claim.

The pertinent facts are as follows:

1. Claimant, Walter Schilling, was born in Bremen, Germany, in 1910. He has always been a citizen and resident of Germany.

2. The vested property from which the proceeds herein claimed were derived was owned by the claimant immediately prior to vesting.

3. Claimant was opposed to the principles of Nazism, and, in 1937, refused an invitation to join the Nazi party.

4. In 1934 claimant received a law degree from the University of Munich and thereafter served until 1939 (except for a one year period) as a "referendar" (young barrister attending the courts to qualify for admission to the bar) in the courts of Bremen. In 1939, claimant became eligible to take his final examination for admission to the legal profession. At that time the chairman of the examining board in Bremen was a prominent Nazi who would not pass any applicant who was not a member of the Nazi party or one of its affiliated organizations. The chairman refused to pass claimant, giving as his reason: "very poor performance professionally in the major task and two examination papers and in the oral examination. Politically completely passive." During the oral interview required of all candidates, the chairman informed the claimant that it would be useless for him to pass the examination since he had not joined a Nazi organization and thereby had placed himself outside the community of the German people.

5. After failing his final examination in 1939 claimant served an additional six months as a referendar in the Bremen courts. He took the final examination for the second time in March 1940 before another chairman of the examining board who passed him. During the oral interview, however, this chairman told claimant that he could not hope for a career if he did not belong to the Nazi party or an affiliated organization.

6. An applicant for admission to the bar at the time claimant became eligible to apply for admission (and until after the cessation of hostilities) was, as a practical matter, required to be a member of the Nazi party or an

affiliated organization. In view of this requirement, claim ant, knowing that he would not be licensed without suc membership, did not apply for permission to practice la after passing his examination. Instead he served as legal clerk in a Bremen law firm until 1942 and in tha year he went to work for a German industrial firm in legal capacity where he was employed until the end o hostilities. Thereafter, claimant applied for admission t the bar and was licensed to practice law in 1946.

As a wartime citizen and resident of Germany, claiman is ineligible for the return of vested property unless h qualifies under the first proviso of section 32(a)(2)(D) o the Trading with the Enemy Act as

> "an individual who, as a consequence of any law decree, or regulation of [Germany] discriminatin against political, racial, or religious groups, has at n time between December 7, 1941, and the time whe such law, decree, or regulation was abrogated, enjoye full rights of citizenship under the law of such nation."

The claimant argues that since the Weimar Constitutio guaranteed all qualified applicants the right to a licens to practice law, the Nazi government's abrogation of tha right was a substantial deprivation of the rights of Ger man citizenship within the meaning of the above-quoted proviso. There is no doubt that claimant and his fellow German nationals who lived under the Nazi regime were deprived of most of the civil rights which had been granted by the Weimar Constitution. However, this genera deprivation of rights cannot properly be held to afford the basis for relief under the first proviso of section 32(a)(2) (D). To construe the proviso in this way would produce the absurd result of making eligible for return every Ger man claimant who was born prior to the advent of the Nazi regime. The language of the proviso is plainly not

open to that construction and its clear intent is to make eligible for return only those German nationals who, as a result of laws or decrees discriminating against political, racial or religious groups, enjoyed rights of citizenship after December 7, 1941, substantially inferior to the *contemporary rights of German citizens generally.* See *Matter of Kashiro Maeda,* Title Claim 45628, Decision of Director, February 3, 1954, where I stated:

> ". . . The Congress which enacted the law was well aware that our enemies in the war were dictatorships, in which the civil rights of the common citizen were few, and that life during the war years was hard for all but the favored classes. These circumstances were not made the tests of eligibility for return; if they had been, practically the entire population of the enemy countries would be eligible for return. . . . The return provided by the first proviso of Section 32(a)(2)(D) was an act of grace, limited to the persecuted minorities who suffered so grievously at the hands of enemy governments. . . . The tests prescribed by Congress for eligibility for return as a member of this limited class were definite, clear and strict. For an enemy national to qualify under the proviso it must be clear that, at all times after December 7, 1941, the *claimant was deprived of the rights of citizenship commonly enjoyed by other inhabitants of the country.* . . ." (Italics added)

See also *Matter of Hermann Winter,* Title Claim 45960, Recommended Decision of Hearing Examiner adopted by Deputy Director January 25, 1956, which involved the claim of a German school teacher who was dismissed because of non-membership in a Nazi organization. In that decision it was stated:

> "To be eligible under this section of the Act [section 32] a claimant must show that the civil rights of which

> he was deprived were generally available to the majority of German citizens. The loss of privileges available only to members of the Nazi party is not a denial of civil rights within the meaning of section 32(a)(2)(D)."

Even if it were to be assumed that denial of a license to practice law deprived claimant of full rights of citizenship, his claim must be disallowed for the reason that he was not a member of a political, racial or religious group that was discriminated against. Anti-Nazis and non-Nazis do not constitute a political group. *Matter of Mathilde Dietrich,* Claim 37849, Decision of Director, August 11, 1955; *Matter of Walter Lutz,* Claim 42142, Hearing Examiner's decision September 30, 1955, petition for review denied by Director April 2, 1956; *Matter of Heinrich Georg Lutz,* claim 42143, Hearing Examiner's recommended decision adopted by Director June 22, 1956. As was stated in the *Dietrich* claim, *supra,*

> "neither the language nor the legislative history of section 32 indicates that Congress intended the phrase 'political groups' to include a body of individuals so amorphous and so large as that described by the Hearing Examiner [German citizens present in Germany during the war, who were not Nazi sympathizers and who opposed Nazism]."

In *Matter of Walter Lutz, supra,* a case which is indistinguishable from the instant matter, I disallowed the claim of an anti-Nazi physicist with two graduate degrees who was barred from the teaching profession in Germany because he was not a member of the Nazi party or one of its affiliated organizations of teachers. The disallowance was based on a holding that anti-Nazi graduate physicists so barred from the teaching profession did not constitute a

political, racial or religious group within the purview of section 32(a)(2)(D) of the Act. See also *Matter of Hermann Winter, supra.*

Based upon the foregoing findings of fact and the record, I conclude that:

1. Claimant was a wartime resident of Germany and thus, as an enemy under section 2(a) of the Trading with the Enemy Act, as amended, is ineligible for the return of vested property under section 9(a); and

2. Claimant does not qualify for return under the standards of the first proviso of section 32(a)(2)(D).

Accordingly, Title Claim 37310 is hereby disallowed.

(Signed) Dallas S. Townsend

DALLAS S. TOWNSEND,
Assistant Attorney General
Director, Office of Alien Property.

April 2, 1958.

No. 359

In the Supreme Court of the United States

OCTOBER TERM, 1959

WALTER SCHILLING, PETITIONER

v.

WILLIAM P. ROGERS, Attorney General

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

DAILEY S. TOWNSEND,
Assistant Attorney General,

IRVING JAFFE,
GEORGE B. SEARLS,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases:

Cases—Continued

Constitution and statutes:

Statutes—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING, PETITIONER

v.

WILLIAM P. ROGERS, Attorney General

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the district court (J.A. 38)[1] denying the motion to dismiss is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 20-21) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 21, 1959 (Pet. 22). The petition for a

[1] The Joint Appendix in the Court of Appeals is designated herein as "J.A."

writ of certiorari was filed on August 18, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a district court has jurisdiction under the Administrative Procedure Act, the Federal Declaratory Judgment Act, or any other provision of law to review an administrative decision under Section 32 of the Trading with the Enemy Act which holds that an applicant is not a persecuted person eligible for the return of vested property under the provisions of Section 32(a)(2)(D).

STATUTES INVOLVED

The pertinent provisions of Sections 7(c), 9(a), and 32(a)(2) of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. § 1, *et seq.*, as well as the provisions of the Declaratory Judgment Act, as amended, 68 Stat. 890, 28 U.S.C. (Supp. V) § 2201, and the provisions of Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009, are printed in the petition (pp. 23-30). In addition, we have set forth in the Appendix to this brief (*infra*, pp. 14-15) the provisions of Sections 9(f), 32(a)(5), and 32(f) of the Trading with the Enemy Act.

STATEMENT

Since the case was disposed of below on a motion to dismiss, it is necessary to consider only the facts as alleged in the complaint (J.A. 32-37).

(1) The petitioner is, and has been at all relevant times, a resident and citizen of Germany (J.A. 32), and, admittedly, is an "enemy" who may not sue under Section 9(a) of the Trading with the Enemy Act (Pet. 17). He claims, however, to be qualified for a return of vested property under Section 32(a)(2)(D) of the Act,[2] on the ground that he was a member of a "political group" within the meaning of that section, who was discriminated against and substantially deprived of full rights of German citizenship in that as a known opponent of Nazism he was denied admission to the practice of law in Germany. The Nazis, he alleges, recognized and treated anti-Nazis and non-Nazis as a political group (J.A. 34). Deeming himself qualified for a return under Section 32(a)(2)(D), the petitioner filed with the Office of Alien Property his Notice of Claim (J.A. 34). After a hearing a hearing examiner concluded that the petitioner was a member of a political group, those who rejected an invitation to join the Nazi Party, and that he was eligible for a return under Section 32; he recommended allowance of the claim (J.A. 34-35).[3] The Director of the Office

[2] Section 32(a)(2)(D) provides that a return of vested property may be made "to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation * * *." Pet. 26-27.

[3] The hearing examiner's Recommended Decision is printed in the petition, pp. 31-39. According to the exam-

of Alien Property, however, rejected the examiner's recommendation, determined that the petitioner had not been denied full rights of German citizenship and was not a member of a political group that was discriminated against, and concluded that the petitioner did not qualify for a return under Section 32. Accordingly he disallowed the claim.[4] The Attorney General determined not to review the decision of the Director, so the petitioner had exhausted his administrative remedies (J.A. 35).

(2) In addition to these allegations of fact, the petitioner, in his complaint, alleged (par. 11) that the provisions of Section 32(a)(2)(D) do not permit the Attorney General (for whom the Director acts) any discretion in determining the eligibility of a claimant for a return under said section (J.A. 34). The complaint also alleged (par. 17) that the decision of the Director was illegal and erroneous in that there was no legal substantial evidence on the record as a whole to support it; that it was unreasonable, arbitrary and capricious and in express disregard of the purpose of Congress (J.A. 35). And, finally, the complaint alleged that there existed an "actual controversy" as to the petitioner's eligibility, that the effect of the decision would be to circumvent and destroy the purposes of Congress, and that "No Federal Statute precludes judicial review of the aforesaid Agency action" (J.A. 36).

---

iner, all of the evidence was documentary, except for the testimony of one witness called by claimant (Pet. 32).

[4] For the Decision of the Director, see Pet. 40-45.

The complaint prayed a review and a setting aside of the decision of the Director, a declaration that the petitioner is eligible for a return of the vested property, a direction to the Attorney General to determine whether a return to the petitioner is in the interest of the United States, and other and further relief (J.A. 36).

The Attorney General moved to dismiss the complaint for want of jurisdiction on the ground that administrative action under Section 32 of the Trading with the Enemy Act is not subject to judicial review (J.A. 37). The District Court denied the motion, and made the findings required by Section 1292(b) of Title 28, United States Code, which authorizes certain interlocutory appeals (J.A. 38). The Court of Appeals granted leave to appeal (J.A. 40), and, after hearing, reversed and remanded with directions to dismiss for lack of jurisdiction (Pet. 20-22).

ARGUMENT

1. What the motion to dismiss admitted.

In the Statement, *supra*, we have designated as "(1)" the paragraph setting out the allegations of fact in the complaint. In paragraph "(2)" we have set out the allegations of the complaint which are either conclusions of law or characterizations by the petitioner of the acts of the Director of the Office of Alien Property, such as the allegations that the Director's decision was "illegal," "arbitrary and capricious," and that "there was no legal substantial evidence on the record as a whole to support it."

The petitioner proceeds on the assumption that the motion to dismiss admitted his conclusions and characterizations, as well as his allegations of fact. See the Questions Presented (Pet. 2-3) and, for examples, pages 9, 12, 17, 18, and 19 of the petition.[5] The well-settled rule, however, is that a motion to dismiss admits the facts well pleaded, but that it does not admit the conclusions of law stated in the complaint or the attempts of the pleader to characterize acts as "illegal," or "arbitrary and capricious." See *Newport News Co.* v. *Schauffler*, 303 U.S. 54, 57; *Ryan and Scoggin*, 245 F. 2d 54, 57 (C.A. 10); *Dayton* v. *Gilliland*, 242 F. 2d 227 (C.A.D.C.), certiorari denied, 355 U.S. 813; *Michaelson* v. *Herren*, 242 F. 2d 693, 696-697 (C.A. 2); *Mengel* v. *Nashville Paper Prod. & Spec. Wkrs. Union*, 221 F. 2d 644, 647 (C.A. 6). Also, when specific facts are alleged which qualify or contradict the conclusory allegations, the court will disregard the latter in determining the nature of the cause of action stated in the complaint. *Mengel* v. *Nashville Paper Prod. & Spec. Wkrs. Union, supra; Gentila* v. *Pace*, 193 F. 2d 924, 926 (C.A.D.C.), certiorari denied, 342 U.S. 943; *Anderson* v. *Seeman*, 252 F. 2d 321, 325-326 (C.A. 5).[6]

---

[5] In addition, the complaint alleged that the provisions of Section 32(a)(2)(D) gave the Attorney General no discretion in determining the eligibility of a claimant under Section 32(a)(2)(D) for a return (J.A. 34) and that no Federal statute precludes judicial review of the "Agency" action (J.A. 36).

[6] The *Chicago Junction Case*, 264 U.S. 258, the only authority cited on the point by the petitioner, was a case in

Reading the complaint as a whole it is clear that when the petitioner alleged that the Director's decision was not supported by substantial evidence, he meant only that it was erroneous as a matter of law on the evidence presented. The rhetorical allegations of "arbitrary and capricious," "illegal," and so on were not admitted by the motion, and the question presented was simply whether the District Court had jurisdiction to review an administrative decision under Section 32 which was claimed to be erroneous as a matter of law.

2. The decision below was clearly correct and there is no conflict of decision.

Including the present case, the question of judicial review of administrative action under Section 32 has been before the Court of Appeals for the District of Columbia Circuit five times, and each time the decision has been that there is no jurisdiction. For the earlier cases see *McGrath* v. *Zander*, 177 F. 2d 649 (C.A.D.C.); *Hawley* v. *Brownell*, 215 F. 2d 36 (C.A.D.C.); *Tiedemann* v. *Brownell*, 222 F. 2d 802 (C.A.D.C.); *Legerlotz* v. *Rogers*, 266 F. 2d 457 (C.A.D.C.).[7] The uniform basis for these holdings

---

which there was an allegation in general terms of illegal administrative action ("wholly unsupported by evidence"), which was not qualified or contradicted by any specific allegations or exhibits.

[7] *Legerlotz* is pending in this Court on a petition for a writ of certiorari, No. 213, this Term. *Tiedemann*, like the present case, involved a question of "eligibility" under Section 32(a)(2)(D); both *Hawley* and *Tiedemann* involved claims of discrimination or persecution under the first pro-

has been that under the Trading with the Enemy Act the only judicial remedy open to a claimant to vested property is a suit in equity under Section 9(a).

This accords with the numerous decisions in a variety of contexts in this Court and in other courts to the effect that the "sole relief and remedy" provision of Section 7(c) (Pet. 24) means just what it says. See *Becker Co.* v. *Cummings*, 296 U.S. 74, 79; *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 487; *Von Opel* v. *Uebersee Finanz Korporation*, 225 F. 2d 530 (C.A.D.C.), certiorari denied, 350 U.S. 935; *Berger* v. *Ruoff*, 195 F. 2d 775 (C.A.D.C.), certiorari denied, 343 U.S. 950; *Pflueger* v. *United States*, 121 F. 2d 732 (C.A.D.C.), certiorari denied, 314 U.S. 617; *Cummings* v. *Hardee*, 102 F. 2d 622, 627 (C.A.D.C.), certiorari denied, 307 U.S. 637; *Ecker* v. *Atlantic Refining Company*, 222 F. 2d 618, 621 (C.A. 4), certiorari denied, 350 U.S. 847; *Koehler* v. *Clark*, 170 F. 2d 779, 780 (C.A. 9); *Becker Steel Co.* v. *Cummings*, 95 F. 2d 319, 320 (C.A. 2), certiorari denied, 305 U.S. 604; *Kuttroff* v. *Sutherland*, 66 F. 2d 500, 501 (C.A. 2); *Kahn* v. *Garvan*, 263 Fed. 909, 915 (S.D.N.Y.).

This also accords with the plain language of the Act. Section 7(c) provides:

> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter * * * transferred * * * to the Alien Property Custodian * * * or seized

---

viso of Section 32(a) (2) (D). *Zander* also involved the construction of Section 32(a) (2) (D).

by him shall be that provided by the terms of this Act * * *. [Pet. 24.][8]

The sole *judicial* remedy "provided by the terms of this Act" for a recovery of property is a suit under Section 9(a). *Becker Co.* v. *Cummings, supra.* Section 32 also provides a remedy, but that is purely administrative and discretionary. *McGrath* v. *Zander, supra.*

The petitioner urges (Pet. 18-19) that Section 7 (c) has only the effect of limiting actions for the *recovery* of property to suits under Section 9(a) by non-enemies, leaving enemies, who may not sue under that section, free to avail themselves of other legal remedies which are forbidden by 7(c) to non-enemies. This curious reading of "sole relief and remedy" is not justified by the language of the Act or by any of the decisions petitioner cites (Pet. 19). For instance, when this Court in *Becker Co.* v. *Cummings, supra,* 296 U.S. at 79, said that the "all-inclusive language of § 7(c)" denied to a non-enemy owner any remedy except under Section 9(a), there was no implication that enemies could have other remedies. "[S]ole relief and remedy" means the "one and only remedy" for "any person having any claim," and if it is "all-inclusive" it does not exempt enemies.

It was obviously the intent of Congress to channel

---

[8] Also Section 9(f): "Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not or execution, or subject to any order or decree of any court" (*infra,* p. 14).

all litigation involving vested property[9] into Section 9(a) and to bar all other forms of litigation. Judicial review under the Administrative Procedure Act (Pet. 28-30) is a form of "relief and remedy" and hence barred, as the Court of Appeals held in *McGrath* v. *Zander*, *supra*.[10]

By parity of reasoning there is no jurisdiction under the Declaratory Judgment Act to review action under Section 32, for a declaratory judgment is a form of "remedy" and it is not "provided" by the

---

[9] Except suits by creditors to recover debts. See Section 34 of the Act.

[10] The petitioner suggests (Pet. 14) that Section 32 does not clearly preclude judicial review. This apparently refers to Section 12 of the Administrative Procedure Act (5 U.S.C. 1011), which, however, applies to "subsequent legislation." The amendment to Section 32, under which petitioner claims, was enacted August 8, 1946 (60 Stat. 930), but that is beside the point. The section which precludes judicial review of action under Section 32 is Section 7(c), as amended in 1918 (40 Stat. 1020), and that applies to "any claim" of "any person" to property "heretofore or hereafter * * * [seized] by the Alien Property Custodian" (Pet. 24). The petitioner does not urge that there has been a repeal of Section 7(c) *pro tanto* and by implication. The legislative history cited at length by the petitioner (Pet. 10-13) is worthy of the comment that it furnishes "dubious bases for inference in every direction" (*Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260), and the legislative discussion of what would be a "legal wrong" under the Administrative Procedure Act (Pet. 10-12) cannot overcome the clear language of Section 10 of that Act (5 U.S.C. 1009), which exempts from judicial review cases where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion," cited by the Court of Appeals in *McGrath* v. *Zander*, 177 F. 2d 649, 651 (C.A. D.C.).

Trading with the Enemy Act. And in and of itself that Act is not a source of jurisdiction for the district courts. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671; *Putnam* v. *Ickes*, 78 F. 2d 223, 226, quoted and followed in *Marshall* v. *Crotty*, 185 F. 2d 622 (C.A. 1).

In this connection, petitioner puts misplaced reliance on *Perkins* v. *Elg*, 307 U.S. 325, and *McGrath* v. *Kristensen*, 340 U.S. 162 (Pet. 18). Those cases dealt with citizenship or eligibility for citizenship and with deportation. In such situations the guaranty of due process under the Fifth Amendment applies, and there is jurisdiction to review the administrative decision, at least upon *habeas corpus*, so the statutory provision that the Attorney General's decision should be "final" is construed to mean merely final as an administrative matter; the declaratory judgment can be made available as an alternative form of remedy.

In the present situation there is no constitutional requirement to read the statute other than literally, for petitioner admits that he is an "enemy"; hence he is not within the due process and just compensation clauses of the Fifth Amendment. *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120-121; *Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 797 (C.A. 2), affirmed *sub nom. Silesian-American Corp.* v. *Clark*, 332 U.S. 469.

Finally, there is no substance to the argument of the petitioner, apparently advanced as a general proposition (Pet. 17), that a Federal court has jurisdiction to review any agency decision which is illegal,

arbitrary or capricious, or otherwise in excess of delegated powers, and for which he cites *Harmon* v. *Brucker*, 355 U.S. 579, and other cases. Whether Congress is to be held to have intended judicial review depends upon the whole setting and scheme of the statute. *Estep* v. *United States*, 327 U.S. 114, 120; *Switchmen's Union* v. *Board*, 320 U.S. 297, 300-302. There is nothing in Section 32 to indicate that judicial review was intended; the Custodian "may" return property, and only when he finds that such action would be "in the interest of the United States" (Pet. 26-27), and Section 32(f) (*infra*, p. 14) provides that publication of a notice of intention to return shall give no right of action to compel a return. Moreover, the interpretation of Section 32 is within, and not in excess of, the authority of the Attorney General or his delegate.[11]

In summary, the law applicable to this case is settled and there is no conflict of decisions.

3. The case does not call for a review by this Court.

The petitioner urges that the question presented here is of fundamental importance to the proper

[11] Section 32 appears to be a statute in which Congress has "committed to agency discretion" even problems of statutory construction. Cf. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318; *United States* v. *Babcock*, 250 U.S. 328, 331; *Work* v. *Rives*, 267 U.S. 175, 183. Whether the petitioner was a member of a "political group" which had been discriminated against is a question of the construction of Section 32, and the fact that the Nazis treated all non-Nazis as a "political group" (J.A. 34) does not mean that the petitioner was a member of such a "group" for purposes of Section 32.

administration of Section 32, and that hundreds, or perhaps thousands, of cases may be affected (Pet. 7, 9-10). However, all of the cases to date involving the point have arisen in the District of Columbia Circuit, and future cases, if any, will probably arise there also, because of considerations of venue.[12] The Court of Appeals has consistently held, over a period of ten years, that there is no jurisdiction to review administrative action under Section 32. Since the decision below appears to be right, it is submitted that there is no need for a review by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

DALLAS S. TOWNSEND,
Assistant Attorney General.

IRVING JAFFE,
GEORGE B. SEARLS,
Attorneys.

SEPTEMBER 1959.

---

[12] Under Section 9(a), however, the plaintiff in a Section 9(a) suit may sue in the district of his own residence.

APPENDIX

Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. § 1, *et seq.*:

SEC. 9. * * *

(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

* * * * *

SEC. 32(a). The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian * * * or the net proceeds thereof, whenever the President or such officer or agency shall determine—

* * * * *

(5) that such return is in the interest of the United States.

* * * * *

(f) At least thirty days before making any return to any person other than a resident of the United States or a corporation organized under the laws of the United States, or any State, Territory, or possession thereof, or the District of Columbia, the President or such officer or agency as he may designate shall publish in the Federal Register a notice of intention to make such return, specifying therein the person to whom return is to be made and the place where the property or interest or proceeds to be returned are located. Publication

of a notice of intention to return shall confer no right of action upon any person to compel the return of any such property or interest or proceeds, and such notice of intention to return may be revoked by appropriate notice in the Federal Register. * * *

* * * *

☆ U. S. GOVERNMENT PRINTING OFFICE 1959 823849 339

MOTION FOR LEAVE TO FILE

AMICUS BRIEF

ON BEHALF OF HANNAH

BREDON ET AL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING, *Petitioner*,

v.

WILLIAM P. ROGERS, Attorney General.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE ON BEHALF OF HANNAH VON BREDOW ET AL.

CHISMAN HANES
GERALD G. SCHULSINGER
710 Ring Building
Washington 6, D. C.
Attorneys for Applicants

November 20, 1959

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING, *Petitioner*,

v.

WILLIAM P. ROGERS, Attorney General.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, Mrs. Hannah von Bredow and her children, Marguerite Linzbach, Alexandra Bachmann, Diana Saurma, Philippa von Thun-Hohenstein, Maria von Bredow, Herbert von Bredow and Leopold Bill von Bredow, by their counsel, respectfully move for leave to file a brief on the merits as *amici curiae* in this case.[1] Consent to such filing has been given by counsel for petitioner, and requested of the Solicitor General but refused.

Nature of Applicants' Interest

Section 32(a)(2)(D) of the Trading With the Enemy Act[2] provides that vested property may be returned to an individual who, although a citizen and resident of Germany during World War II, at no time enjoyed full rights of citizenship under the law of Germany as a consequence of any German law, decree or regulation discriminating against a political, racial or religious group.

---

[1] Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case was granted October 26, 1959.

[2] Section 32(a) reads, in pertinent part, as follows:

"§ 32. Return of property—(a) Conditions precedent

"The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the

Pursuant to the statute and to the rules and regulations of the Office of Alien Property, Mrs. von Bredow and her children, citizens and residents of Germany during the critical period, timely filed claims for return of certain trust property held in their favor by the Union Trust Company of the District of Columbia and vested by the Attorney General in 1942. The basis for their claim was (1) that during the critical period, they had been members of a "religious group" discriminated against by laws, decrees and regulations of Germany, *i.e.*, the Confessional Synod, which was the group within the Evangelical (Protestant) Church resisting Nazi demands that the Church be subordinated to the State; (2) that they were members of a "political group" discriminated against; and (3) that as a consequence of German laws, decrees and

---

net proceeds thereof, whenever the President or such officer or agency shall determine—

"(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

"(2) that such owner, and legal representative or successor in interest, if any, are not—

". . .

"(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section [March 8, 1946], was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation . . . ." Act of October 6, 1917, c. 106, 40 Stat. 411, as added December 18, 1941, c. 593, Title III, § 304, as added March 8, 1946, c. 83, § 1, 60 Stat. 50, as amended August 8, 1946, c. 878, § 2, 50 Stat. 930, 50 U.S.C. App. § 32.

regulations discriminating against the groups of which they were members, they at no time enjoyed full rights of citizenship under German law, as manifested by continued surveillance, denial of admission of certain of the claimants to a German university, denial of religious freedom, arrest and jailing of certain of the claimants. The facts are set forth in part in the Recommended Decision of the Hearing Examiner disallowing the claim, which Recommended Decision was adopted, without opinion, by the Deputy Director of the Office of Alien Property, whose decision was subsequently affirmed on review by the Attorney General. The Recommended Decision of the Hearing Examiner, the Decision of the Deputy Director of the Office of Alien Property and the Order of the Attorney General on Review, are appended to this motion.

Facts and Questions of Law Not Adequately Presented by the Parties and Their Relevancy

The decision of the Court of Appeals in the *Schilling* case that Section 7(c) of the Act precluded review by the District Court of a determination of eligibility under section 32(a)(2)(D) by the Office of Alien Property that was alleged to be illegal, without substantial evidence on the record to support it, arbitrary and capricious, also precluded judicial review of the administrative determination of eligibility made as to the von Bredows. In the *Schilling* case, the Office of Alien Property determined—and the Attorney General declined to review such determination—that Schilling was ineligible under section 32(a)(2)(D) for a return of vested property. It concluded (1) that Schilling was not a member of a "political group" within the meaning of the statute, despite the Hearing Examiner's finding that Schilling was a known opponent of Nazism and had refused to join the Nazi party when called upon to do so, and (2) that he had not failed to enjoy full rights of citizenship under the law of Germany, despite the denial to him of admission to the practice of law because "he was not considered politically reliable" and "had placed himself outside the community of the German people."

In the *von Bredow* case, the Attorney General determined that although "Mrs. von Bredow was an ardent and outspoken anti-Nazi, . . . as a matter of law she was not a member of a 'political group' within the meaning of the statute." Appendix at page 18a. And while not discussing whether the Confessional Church was a "religious group" within the meaning of the statute, except to affirm the Decision of the Office of Alien Property to that effect, he determined that:

> "While the record demonstrates that claimants were courageous and faithful communicants of the Confessional Church and under official pressure to renounce their allegiance to that church, it does not establish that they were denied full rights of citizenship within the meaning of the statute."

The position of the applicants is this:

(1) There is a justiciable controversy between the von Bredows and the Attorney General within the jurisdiction of the District Court in which the von Bredows should have an opportunity to demonstrate to that Court that the determination of the Attorney General as to their non-eligibility under section 32(a)(2)(D) is illegal. For example, section 32(a)(2)(D) permits return to individuals who "at no time . . . enjoyed full rights of citizenship under the law" of Germany, *i.e.*, who were deprived of *some* rights at all times; in contrast, the Attorney General's test, as set forth in his Order, is that "the record . . . does not establish that they were denied full rights of citizenship within the meaning of the statute," *i.e.*, were not deprived of *all* rights at all times. The von Bredows should be afforded the opportunity—and the Declaratory Judgment Act, the Administrative Procedure Act, and the general grant of federal-question jurisdiction provide that opportunity—thus to demonstrate that the Attorney General applied an erroneous legal test to the detriment of the von Bredows.

(2) Assuming, *arguendo*, that the Attorney General has any discretion in the making of eligibility determinations under section 32(a)(2)(D), then the von Bredows should be afforded the opportunity provided by the relevant

statutes to show that his conclusions, and those of his subordinates affirmed by him, were without substantial evidence on the record to support them, arbitrary and capricious. For example, the Hearing Examiner concluded that the Confessional Church was not a "religious group" discriminated against by the laws, decrees and regulations of Germany, despite laws, decrees and regulations, noted by the Hearing Examiner, directed by their express terms against the Confessional Church. Appendix at page 12a. In other words, he concluded that the Confessional Church, which was recognized as a group by the Hitler government and specifically singled out for discrimination, was not a "religious group" under the Act. Such conclusions, offensive to the facts, are not entitled to immunity from review by a court of competent jurisdiction.

(3) A recent major study of the right to judicial review teaches that only the "clearest statement of intent" by Congress should be allowed to preclude judicial review. Jaffe, "The Right to Judicial Review," Part I, 71 Harv. L. Rev. 401, Part II, 71 Harv. L. Rev. 769 (1958). The Court of Appeals in *Schilling* decided that section 7(c) of the Trading With the Enemy Act, enacted in a different context during World War I, twenty-eight years before the relevant proviso of section 32(a)(2)(D), barred judicial review of administrative determinations pursuant to it. We believe that this Court, in analyzing whether section 7(c) is that "clearest statement of intent," would be aided in having familiarity with the additional administrative determinations involved in the *von Bredow* case to which the Court's analysis would apply.

Respectfully submitted,

.....

CHISMAN HANES

.....

GERALD G. SCHULSINGER
710 Ring Building
Washington 6, D. C.
Attorneys for Applicants

November 20, 1959

APPENDIX

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
OFFICE OF ALIEN PROPERTY

In the Matter of:
HANNAH VON BREDOW, ET AL.

Title Claim No. 42152

Docket No. 54 T 70

Recommended Decision of Harry R. Hinkes, Hearing Examiner

STATEMENT OF THE CASE

This is a proceeding for the return of property under section 32 of the Trading with the Enemy Act, as amended (50 U.S.C. Appx. 32), conducted in accordance with the Rules of Procedure for Claims under the Trading with the Enemy Act, as amended (20 Fed. Reg. 7529).

By Vesting Order No. 441, dated December 4, 1942, and amended September 10, 1943, this Office vested the interests of Hannah von Bredow (hereinafter referred to as the claimant), and her children, Marguerite, Alexandra, Diana, Philippa Maria, Herbert and Leopold Bill, in and to certain property held in trust by the Union Trust Company of Washington, D. C., as Trustee under an agreement dated March 11, 1940, executed by and between Waldemar Leopold von Bredow, Hannah von Bredow and said Trust Company. Notices of Claim were filed by the claimant and her children on April 6 and April 9, 1949, in which the value of claimed property was estimated to be $350,000. Pursuant to notice, a hearing was held before George W. Carr, Hearing Examiner, on April 20, 1954. Messrs. Chisman Hanes and Michael A. Schuchat, of Klagsbrunn, Hanes and Irwin of Washington, D. C., appeared for the claimant and her children. Mr. William K. Jackson appeared for the Chief of the Claims Section. The record consists entirely of documentary evidence, in-

cluding statements of the interested parties and witnesses. No oral testimony was presented. Proposed findings and extensive briefs were filed by the parties. On December 11, 1955, the claim was reassigned to me for recommended decision.

Proposed Findings of Fact

From the entire record, I find:

1. The claimant, Hannah von Bredow, and her seven children were German nationals and were present in that country during the period beginning December 7, 1941, and ending March 8, 1946.

2. The claimant and her children were communicants of the Evangelical (Protestant) Church in Germany.

3. Protestantism arose in Germany in the Sixteenth Century, following the Reformation. From the beginning, Lutheranism had a national cast—the local German prince was to determine the religion of his principality. He, in turn, delegated the power of church government to ministers of State and consistorial officers whom he controlled. With the creation of the German Republic after World War I, an effort was made to sever the traditional bonds between Church and State. Only partial change was achieved, however. Local congregations were allowed the right of self-administration, but the legal sovereignty of the State and its supervision of church laws were recognized.

4. In 1933, using the Reichstag fire as the justification, Chancellor Hitler obtained a decree from President von Hindenburg suspending the constitutional guarantees of free speech, free press, rights of assembly, rights of privacy in communications, etc. Religious freedom, also guaranteed by the Weimar Constitution, was not suspended by the presidential decree. In fact, Hitler's Reichstag speech of March 23, 1933, assured the Church that its rights were not to be infringed.

5. The Nazi Party was always predominantly anti-Christian in its ideology. National Socialism was considered the ultimate substitute for Christianity. Under the Nazis, the content of Christianity was only what National Socialism chose to allow.

6. The strategy against the Protestants wes designed to unify the numerous sects into a single national church responsive to the will of the State. That group in the Protestant Church which responded to the Nazi demands that the Church be subordinated to the State called themselves "German Christian" (*Deutsche Christen*) and was able to secure the election of a Nazi as Reich Bishop (July 14, 1933, RGB1. I/471). The opposition within the Evangelical Church became known as the Confessional Church (*Bekenntnis-Kirche*).

7. In 1933, the entire religious press of Germany was put under State control (*Law Concerning Editors*, December 1933).

8. Under the Nazified control of the Evangelical Church, the 700,000 members of the Evangelical Youth Movement were transferred to the Hitler Youth in 1933.

9. On January 4, 1934, the Reich Bishop forbade pastors from mentioning the controversy between the "German Christians" and the Confessional Church.

10. On November 5, 1934, the *Law Concerning the Regulation of Public Collections* (RGB1. I/1086), subjected public collections to State approval. The Confessional Church, held to be an illegal nonconformist group by a German court decison in 1937, was denied exemption from the Collections Law, restricting the fund-raising efforts of that Church.

11. On November 6, 1934, the Minister of the Interior prohibited all discussion of the Church question in the press, pamphlets or books.

12. The hiring of rooms for any kind of church meetings was banned in 1934.

13. In March 1935, the Prussian State Government assumed control over the Evangelical Church in Prussia. *The Fifteenth Decree for the Execution of the Law for the Safeguarding of the German Evangelical Church* of June 26, 1937 (RGBl. I/697), did a similar thing for all Germany.

14. In June 1935, the Church was denied access to the civil courts on church suits which were then transferred to a special tribunal (*Beschlusstelle*) in the Ministry of the Interior (*Law Concerning Procedure for Decisions in Legal Affairs of the Evangelical Church,* RGBl. I/774; *First Ordinance for Execution of the Law,* RGBl. I/851). This function was later transferred to a Minister for Religious Affairs (RGBl. I/1029, July 16, 1935; RGBl. I/1178, September 24, 1935).

15. On July 20, 1935, the Minister of the Interior issued instructions to the Gestapo that Confessional youth organizations were forbidden to wear uniforms or insignia or engage in outdoor sport activity.

16. In October 1935, the Propaganda Ministry imposed a censorship before publication on all church periodicals.

17. In 1937, many Confessional pastors were arrested for their outspoken criticism of the Nazi Government. Such prosecution, however, was in accordance with laws promulgated as early as December 10, 1871, and February 26, 1876 (RGBl. 28), which restricted the clergy from discussing matters of state in a manner endangering public peace.

18. Confessional theological schools, set up in contravention of a German decree of 1935, were closed in 1937 by police order pursuant to an anti-Communist law of 1933 (February 28, 1933, RGBl. I/83).

19. Radio broadcasting of all religious services was banned in 1939.

20. In 1939, the right of a parish to choose its own pastor was abolished, the control being lodged in a Nazi-dominated consistory.

21. Just before World War II started, 95 percent of the German people belonged to one of the two Christian Churches. Much more than half of the German population belonged to the Protestant Church; of the Protestant clergymen, only 747 of the 5300 ministers of the Church of Old Prussia were Nazi "German Christians"; in the Rhineland, only 130 of 800 ministers were "German Christians."

22. With the outbreak of World War II, more repressive measures against the Church were taken. Denominational schools were closed; religious instruction in schools was curtailed; the printing of new Bibles was forbidden; the religious press was completely suppressed; church property was taken over for government use; state aid in the collection of church taxes was ended; ministry candidates were required to register their non-Confessional attitude; clergymen were drafted for military service in large numbers; processions and pilgrimages were forbidden.

23. Although the organization of the Confessional Church had practically become non-existent with the war, many Confessional pastors went on with their spiritual work, wherever possible. The Confessional Church carried on its Bible studies, lectures, confirmation classes and children's service. Under the stress of continuing war, Nazi religious policies were increasingly determined on the basis of expediency, and, as the Nazis suffered military reverses, more and more Germans returned to the Church.

24. Although many officials of the Confessional Church were imprisoned, restricted in movement or otherwise

persecuted for their resistance and opposition to the Nazi dictates, the record contains only one reference to such treatment accorded a non-official member of that church. Although various reasons are given for the matter, it appears most likely that that person, Prof. von Dietze, conducted a secular divine service after the Nazi ecclesiastical authorities had prohibited church services and was thereupon arrested by the authorities.

25. Throughout the Nazi regime, claimant was a courageous and faithful communicant of the Confessional Church, and instilled a similar spirit within her children.

26. Claimant and her children attended the Holy Ghost Church (*Heiligengeistkirche*) in Potsdam. When the Confessional pastor was replaced by a "German Christian," they attended another Confessional Church in Potsdam. The Garrison Church, although Confessional, was not molested and was attended by the claimant also. Claimant's church attendance was regular; the services, though unadvertised, were open to the public and were never forcibly stopped or specifically banned. In addition to the religious services on Sunday, the Church held Bible and confirmation classes and the customary ministrations were performed. As claimant's children became of age, each was confirmed, even during the war years. Although claimant made generous contributions to the Church (in violation of Nazi law), and took an active part in Church matters, she never held any official position in the Church.

27. Claimant's Confessional Church was denied fuel for heating when World War II broke out. The Garrison Church had no heat after 1942. All churches, even "German Christian" Churches, were unheated after 1943. Clandestine evening church meetings were held in other buildings which had been heated during the day.

28. Claimant's children were educated in private schools. Marguerite entered Berlin University in 1934, studied

medicine, and was a practicing physician during the war. Alexandra and Diana entered the Kaiserin-Augusta-Stiftung in 1930 and completed their course of study in 1937 and 1938, respectively. Philippa entered the same school in 1934 and finished in 1941, and Maria attended from 1935 to 1944. None of the five daughters was obliged to join Nazi youth organizations. Marguerite satisfied the authorities by working on a farm; Alexandra and Diana were exempted because they were in their last year of study when it became obligatory to join the organizations (1937); Philippa and Maria were excused for medical reasons. Herbert and Leopold Bill attended private schools between 1934 and 1942. Leopold Bill never joined any Hitler youth organization while Herbert was excused from serving for medical reasons.

29. None of claimant's children's, aside from Marguerite, applied for admission to a German university; none was refused such admission.

30. Membership in the Nazi youth organizations was generally a prerequisite to admission to a German university after 1937. Exceptions to this rule were made, for example, when the applicant had been unable to join such organizations for physical reasons. Exception would have been granted, therefore, to each of the claimant's children (who did not enter any university) had they applied for admission, since Philippa and Maria had been excused from joining those organizations for medical reasons, and Alexandra and Diana were exempt because they were in their last year of preparatory study in 1937. Leopold Bill and Herbert were too young to attend a university during the war.

31. After finishing her studies at the Kaiserin-Augusta-Stiftung, Philippa attended a Berlin language school. In 1943, when ordered to work for the government in occupied France, she managed to satisfy the authorities by obtaining a job in a Berlin airplane firm.

32. Claimant was publicly and vigorously anti-Nazi. She refused all requests to join the Nazi Party. She did not permit her children to join Nazi youth organizations. She refused to fly the swastika. She refused to christen a battleship named for her grandfather, German Chancellor Bismarck. She helped Jewish friends and compulsory French laborers. She refused to transfer her property in the United States to Germany. She maintained a friendly interest in foreign anti-Nazi publications and broadcasts. She and her children distributed anti-Nazi literature. Their house was a meeting-place for many people who were against Hitler and plotted his assassination.

33. Claimant was under surveillance by the Nazis soon after they came into power. A dossier concerning her and her children was maintained by the Government.

34. Early in the Hitler reign, claimant made plans to leave Germany, but stayed when the authorities threatened to molest her mother.

35. Claimant was interrogated by the Nazis a number of times, and on many of these occasions, was questioned about her membership in the Confessional Church.

36. Claimant visited England and Switzerland in 1936.

37. In 1936, claimant was questioned by the authorities about an anti-Nazi group and was threatened with arrest in anonymous after-midnight phone calls.

38. In 1937, after making critical remarks in Austria about the Nazis, claimant was met at the railroad station by Gestapo agents who accompanied her to her home where she was questioned at length.

39. In 1937, claimant's passport was taken by the authorities because she had been accused of attempting to smuggle money into Switzerland to start a resistance movement there. The passport was returned to claimant in May 1938.

40. In 1941, claimant visited Rome. In 1942 and 1943, she visited Switzerland as did her seven children.

41. In August 1944, claimant went to Switzerland with Maria, Herbert and Leopold Bill.

42. Marguerite, Diana, Philippa and Alexandra were arrested by the Nazis in August 1944, because of their alleged complicity in the unsuccessful attempt on Hitler's life in July. Marguerite was released immediately because her skills as a physician were needed but she was required to report to the Gestapo daily. Diana and Alexandra were held, in part, as hostages to force claimant's return to Germany. They were released in November only after the claimant had returned from Switzerland with Maria. Maria was then sent to a labor camp from which she was released in March 1945. Because of the poor state of her health, claimant was not imprisoned but hospitalized immediately upon her return. At the hospital, she was interrogated by the Gestapo repeatedly. In December 1944 claimant was discharged from the hospital without arrest. Claimant was offered Philippa's freedom if she would renounce her family's allegiance to the Confessional Church, but she refused. Philippa remained in jail until April 1945.

43. A third son of claimant, Wolfgang, served in the German Army until March 1945 when he was reported missing in action. He is presumed dead, leaving no issue. His next of kin are his mother, brothers and sisters.

Discussion

Persons resident within Germany during the war are, by definition, enemies under the Trading with the Enemy Act, and, therefore, not entitled to the return of property vested by this Office. They may, however, be eligible for a discretionary, administrative return of the property pursuant to section 32 of that Act, provided they

satisfy certain tests prescribed therein. Under section 32(a)(2)(D), a German national must prove that

> as a consequence of any law, decree or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, [he] has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation.

Claimant stresses her experiences as a member of the Confessional Church as indicating denial of full rights of citizenship. She points to her repeated interrogations by Gestapo officials, her forced transfers from one Confessional Church to another to avoid "German Christian" pastors, her Church's lack of fuel for heating. She further cites her experiences resulting from her anti-Nazi stand: the temporary forfeiture of her passport in 1937-1938; the anonymous threatening phone calls during nights; more interrogations, even while hospitalized, by the Gestapo; the arrest and imprisonment of several of her daughters in 1944; her forced return from Switzerland and "hospital-arrest" thereafter; the social ostracism she suffered.

It is clear that the loss of civil rights contemplated by this section of the Act must be continuous, throughout the period of hostilities, and must be substantial. *Matter of Sztankay*, Docket No. 552, Title Claim No. 4240, decision of the Director dated February 26, 1954; *Matter of Mencke*, Docket No. 53 T 750, Title Claim No. 26392, decision of the Deputy Director dated August 4, 1955; *Matter of Alix Schmidt*, Docket No. 1083, Title Claim No. 46043, decision of the Chief Hearing Examiner dated March 20, 1952, pet. rev. den. August 1, 1952. The discomforts suffered by the claimant and her family throughout the war years were not the ones contemplated by Congress when it provided

for the return of property to those whose civil rights had been reduced *substantially*. Senate Report No. 1839, 79th Congress, 2d Sess., p. 12. Even if the arrest of the claimant and her children in 1944 were considered a substantial loss of civil rights, it took place late in the war and has no retroactive effect for the period 1941-1944. The Nazis' interference with claimant's religious life, strongly urged by her as a substantial deprivation of her civil rights, did not, however, prevent her regular church attendance, nor deprive her of the usual ministrations of the Church. In fact, the Confessional Church carried on its Bible studies, lectures, confirmation classes and children's services all through the war.[1] Moreover, claimant's freedom to travel outside Germany, even during the war, is inconsistent with her claim of persecution.

I need not elaborate further on this aspect of the claim, for even if the claimant failed to enjoy full rights of citizenship throughout the war, it must be shown that this failure was the result of German laws discriminating against a racial, religious or political group. In this connection, claimant has arrayed an impressive list of laws and governmental decrees which are claimed to be directed against the Confessional Church of which she was an active member. That the Confessional Church provoked the displeasure of the Nazis cannot be denied. An examination of the laws cited, however, does not demonstrate the alleged discrimination. Thus, the *Law Concerning Editors* (Finding No. 7), the 1943 decree of the Minister of the Interior (Finding No. 11), the prohibition against hiring of rooms for church meetings (Finding No. 12), the 1935 pre-publication censorship of church periodicals (Finding No. 16), the prohibition of radio broadcasting in 1939 (Finding No. 19) and the repressive measures detailed in Finding No. 22, were of general

[1] 165 The Fortnightly 266 (1946).

applicability, affecting all churches in Germany, rather than discriminatory towards any group. Other official acts, such as the transfer of the Evangelical Youth members to the Hitler Youth (Finding No. 8), the control of the Evangelical Church by the State (Finding No. 13), the denial of access to the civil courts (Finding No. 14), the banning of certain youth activities (Finding No. 15), the closing of Confessional theological schools (Finding No. 18), and the control of the choice of a pastor for a parish (Finding No. 20), although in terms directed against the Confessional Church, were totalitarian applications of the Nazi domination of all religious life. These were not measures discriminating against a religious minority, favoring a majority who behaved differently. These were but symptoms of the Nazi plan, first to control all religion, and then to subordinate it to the State.

> Fascism which mobilizes the total human personality in the interests of the power of the state cannot accept the principle of independent religious direction of the individual. It cannot accept the basic tenets of the Christian Church which consider God as the highest authority and individuals as His children with equal rights. Fascism and Christianity are therefore basically incompatible.
>
> * * * * *
>
> Under Fascism the state comes first and if religion conflicts with the State, so much the worse for religion.[2]

The attack upon religion by the Nazis is revealed, not so much by official acts and laws which the Nazis used, but by statements of leading officials. Thus, the Reich Minister for Church Affairs, Dr. Kerrl, declared:

---

[2] *Fascism in Action*, Legislative Reference Service, Library of Congress (1947) p. 187.

> There has now arisen a new authority concerning what Christ and Christianity really is. This new authority is Adolf Hitler.[3]

Hitler's *Mein Kampf* was expected to supersede the Bible for religious purposes. It would be propounded and interpreted by National Church "orators" rather than priests or ministers. The Cross would be replaced by the Swastika and Germanic substitutes would take the place of Christian ceremonies and holidays. Martin Bormann, Hitler's Deputy Fuehrer, said in a secret decree of the Party chancellery distributed to all Gauleiters June 27, 1941:

> . . . A differentiation between the various Christian confessions is not to be made here. . . . Just as the deleterious influences of astrologers, seers and other fakers are eliminated and suppressed by the State, so must the possibility of church influence also be totally removed . . .[4]

As Justice Robert H. Jackson, Chief of Counsel for the United States in the Nurnberg War Crimes Trials, stated in his opening address on November 21, 1945:

> . . . The Nazi Party always was predominantly anti-Christian in its ideology . . . To remove every moderating influence among the German people and to put its population on a total war footing, the conspirators devised and carried out a systematic and relentless repression of all Christian sects and churches.[5]

---

[3] Id., p. 189.

[4] *Nazi Conspiracy and Aggression*, Vol. I, U.S. Government Printing Office, Washington, D. C. (1946), p. 264.

[5] Id., p. 131.

In May 1942, Cardinal Faulhaber closed his report to the Vatican, saying:

> Today it is a question of life or death for Christianity, for in its blind rage against religion the Nazi "faith" does not or cannot distinguish between Protestantism and Catholicism.[6]

It is thus apparent that the repression experienced by the Confessional Church in Germany was only part of the over-all loss of religious freedom and independence inflicted by the Nazi regime upon all Germany. Although the right of religious freedom was not suspended by presidential decree in 1933, as were the rights of free speech, free assembly and free press, religious freedom was just as effectively destroyed by the official acts of the Nazis, despite any constitutional barriers to such deprivations. Any opposition to state control of free speech would provoke retaliation and punishment; similar opposition to the control of religion, such as was voiced by many of the Protestant and Catholic clergy, produced similar results. Despite such persecution, more than 95 percent of the German population continued to belong to the two Christian Churches.[7] If the denial of religious freedom to the Christians of Nazi Germany be deemed a denial of full rights of citizenship, then it must follow that 95 percent of the German populace were made eligible for the return of their vested property by the terms of section 32(a)(2)(D) of the Trading with the Enemy Act. This conclusion is no more reasonable than to conclude that the loss of free speech is a denial of civil rights, and since all Germans suffered that deprivation, all Germans are therefore entitled to the return of their vested property. Congress, in formulating section 32, obviously had in mind a persecuted minority whose lot was substantially less

[6] *Fascism in Action*, op. cit. p. 191.

[7] Herman, *Rebirth of the German Church* (1946), p. 45.

favorable than the bulk of the German population. It knew that all Germany had been living under an oppressive and stifling dictatorship where freedoms were the exception, not the rule. If the civil rights lost under the Nazis were to be regarded as the sole basis for eligibility, no mention of discrimination would have been included in the Act; residence in Nazi Germany would automatically qualify one for return. See *Matter of Maeda*, Docket No. 1343, Title Claim No. 45628, decision of the Director, February 3, 1954. On the contrary, a cautious and limited program of return was intended for the benefit of certain minorities of the German population who were not in favor of the Nazi cause. See House Hearings on H. R. 5089, 79th Cong., 2d Sess., p. 81; Senate Hearings on S. 2039, 79th Cong., 2d Sess., p. 10. Congress did not give this Office complete discretion to determine a claimant's anti-Nazi attitude. A claimant's denial of civil rights, *discriminatorily*, was made the test and measure of his non-adherence to the Nazi cause.

The denial of civil rights here involved is the loss of religious freedom. Since that loss was the lot of all Germans (or at least 95 percent of Germans), it follows that no discrimination was practiced, but that all Germans suffered the same loss.

It is admitted that claimant was an outspoken anti-Nazi. In fact, her personality was so vigorous that she was called the "only male descendant" of Bismarck.[8] But anti-Nazism is insufficient to establish eligibility. As the Director concluded in the *Matter of Dietrich*, Docket No. 1645, Claim No. 37849, decision dated August 11, 1955, Congress did not intend to include in the phrase, "political group," a group of individuals so amorphous and so large. This is clearly shown by the description of the group of conspirators who met at the claimant's home.

[8] Dulles, *Germany's Underground* (1947), p. 4.

It included members of the military, former political officials, diplomatic and ministerial functionaries, labor leaders, representatives of the church, professional men, Socialists, trade unionists, pro-Anglo-American advocates, and pro-Russian adherents.[9] Thus, while we may admire and applaud the claimant's individual courage and bravery in resisting Nazi encroachments, we may not authorize a return solely because of it. The Act is not framed simply for the benefit of those who resisted the Nazis; it provides administrative relief for those who were persecuted by the Nazis, and, only then, as a result of laws discriminating against a well-defined political, racial or religious group within the German community.

PROPOSED CONCLUSIONS OF LAW

From the findings of fact proposed above, I propose the following conclusions of law:

1. Claimant, Hannah von Bredow, and her children, were, at all times relevant to this proceeding, citizens of Germany and present in Germany.

2. Claimant and her children have not failed to enjoy full rights of citizenship as a result of any law, decree or regulation of Germany discriminating against political, racial or religious groups.

3. Claimant and her children are not eligible for the return of vested property under section 32(a)(2)(D).

ACCORDINGLY, it is recommended that Title Claim No. 42152, Docket No. 54 T 70, be disallowed.

HARRY R. HINKES
Hearing Examiner

February 28, 1956

[9] Dulles, op. cit.

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
OFFICE OF ALIEN PROPERTY
WASHINGTON, D. C.

Title Claim No. 42152
Docket No. 54 T 70

In the Matter of:

HANNAH VON BREDOW, ET AL.

Decision of Deputy Director

On February 28, 1956, Hearing Examiner Harry R. Hinkes issued a recommended decision disallowing this claim.

The Hearing Examiner's recommendation of disallowance is hereby adopted, and the claim is disallowed.

/s/ PAUL V. MYRON
Paul V. Myron
Deputy Director
Office of Alien Property

August 12, 1957

OFFICE OF ALIEN PROPERTY

Title Claim No. 42152
Docket No. 54 T 70

In the Matter of:

HANNAH VON BREDOW, ET AL.

Order of the Attorney General on Review

This matter is before me pursuant to my order granting review "as to the question whether claimants have estab-

lished their eligibility for a return of vested property under the proviso to § 32(a)(2)(D) of the Trading with the Enemy Act, as amended, relating to discrimination against political, racial, or religious groups." The issue is whether the decision of the Deputy Director of the Office of Alien Property adopting the Hearing Examiner's recommended decision disallowing the claim is correct.

It is not contended that claimants are eligible on racial grounds. Their argument is that they are eligible on political and religious grounds. The Hearing Examiner concluded that claimants failed to establish eligibility on either of those grounds.

I have given this case the most careful and earnest consideration. I am not persuaded, however, that the Hearing Examiner's decision was erroneous. While the record demonstrates that claimants were courageous and faithful communicants of the Confessional church and under official pressure to renounce their allegiance to that church, it does not establish that they were denied full rights of citizenship within the meaning of the statute. It is also clear from the record that Mrs. von Bredow was an ardent and outspoken anti-Nazi. Although the circumstances are most appealing, the difficulty is that as a matter of law she was not a member of a "political group" within the meaning of the statute.

Accordingly, the decision disallowing the claims is affirmed.

WILLIAM P. ROGERS
Attorney General

Dated: June 8, 1959

[redacted] FILE COPY

BRIEF FOR THE PETITIONER

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING,

Petitioner,

v.

WILLIAM P. ROGERS, Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

HENRY I. FILLMAN,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

HENRY I. FILLMAN,
OTTO C. SOMMERICH,
120 Broadway,
New York 5, N. Y.

ISADORE G. ALK,
1026 Woodward Avenue,
Washington 5, D. C.
Of Counsel.

INDEX

CASES CITED

Statutes Cited

MISCELLANEOUS CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING,

Petitioner,

v.

WILLIAM P. ROGERS, Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 12) is reported at 268 F. 2d 584.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered May 21, 1959 (R. 14). The petition for certiorari was filed August 18, 1959 and granted October 26, 1959. The jurisdiction of this Court rests on the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. § 1254(1), 28 U.S.C.A. § 1254(1).

The Statutes Involved

The statutes which the case involves are

(1) the Trading with the Enemy Act, approved October 6, 1917, 40 Stat. 411, as amended, 50 U.S.C. App. § 1 *et seq.*, 50 U.S.C.A. App. § 1 *et seq.*, particularly § 2, 40 Stat. 411, the fourth paragraph of § 7(c) which was added thereto by the Act of November 4, 1918, c. 201, 40 Stat. 1020, § 9(a), 40 Stat. 419, § 32, added thereto by the Act of March 8, 1946, c. 83, 60 Stat. 50 and as amended by the Act of August 8, 1946, c. 878, § 2, 60 Stat. 930, and § 39, which was added thereto by the Act of July 3, 1948, c. 826, § 12, 62 Stat. 1246;

(2) §§ 10 and 12 of the Administrative Procedure Act, 60 Stat. 243, 244, 5 U.S.C. §§ 1009, 1011, 5 U.S.C.A. §§ 1009, 1011;

(3) the Declaratory Judgment Act, as amended August 28, 1954, c. 1033, 68 Stat. 890, 28 U.S.C. § 2201 (Supp. V), 28 U.S.C.A. § 2201; and

(4) Act of June 25, 1948, c. 646, 62 Stat. 930, 28 U.S.C. § 1331, 28 U.S.C.A. § 1331, in effect at the time of the commencement of petitioner's suit on July 8, 1958 and prior to July 25, 1958, when Section 1, Public Law 85-554, 72 Stat. 415, which increased the requisite jurisdictional amount, was approved.

The relevant provisions of the statutes are set forth in the Appendix, *infra*, pages 41-49.

Questions Presented

1. Whether the charge in the complaint, which is admitted by the Attorney General's motion to dismiss, that the decision of the Director of the Office of Alien Property

(and the Attorney General) finding that the petitioner, a non-hostile enemy during World War II, is ineligible to be considered for return of vested property under §§ 32 (a)(2)(D) and 32(a)(5) of the Trading with the Enemy Act was illegal, without substantial evidence on the record to support it, arbitrary and capricious, presents a justiciable controversy within the jurisdiction of the District Court for the District of Columbia.

2. Whether the District Court for the District of Columbia has jurisdiction under the Administrative Procedure Act, the Declaratory Judgment Act, or under the grant of federal-question jurisdiction to the District Courts of a suit to review and set aside a decision of the Director of the Office of Alien Property (and the Attorney General) finding that the petitioner does not qualify under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act for return of vested property, which decision is admitted by the Attorney General's motion to dismiss to be illegal, without substantial evidence on the record to support it, arbitrary and capricious.

3. Whether the petitioner's suit in the District Court to review and set aside the decision of the Director of the Office of Alien Property (and the Attorney General) finding that petitioner is not within a class of persons eligible for return of vested property under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act is forbidden by the fourth paragraph of § 7(c) of said Act which provides that the "sole relief and remedy" of any person having any claim to vested property "shall be that provided by the terms of this Act."

Statement of the Case

This is not a suit to recover property vested by the Alien Property Custodian. The suit seeks a judicial review of a decision of the Director of the Office of Alien Property

(and the Attorney General) that petitioner is not eligible to be considered for return of vested property under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act (Appendix, pp. 44-45).

The Attorney General moved to dismiss the complaint on the ground that the District Court does not have jurisdiction to review administrative action under § 32 (R. 8). The District Court denied the motion (R. 9). An interlocutory appeal was allowed under the provisions of Public Law No. 85-919 approved September 2, 1958, 72 Stat. 1770, 28 U.S.C. § 1292(b), 28 U.S.C.A. § 1292(b) (R. 10). The Court of Appeals reversed the order of the District Court and remanded the case with directions to dismiss the complaint for lack of jurisdiction (R. 14) upon the ground that determination of eligibility for return under the first proviso of § 32(a)(2)(D) is "of a sort committed by Congress to agency discretion" and, therefore, § 7(c) of the Trading with the Enemy Act forbids the suit (R. 13).

The allegations of the complaint (R. 3), which are admitted by the motion to dismiss, are, in substance, as follows:

The petitioner has always been and still is a resident and citizen of Germany. By three vesting orders, effective respectively, August 17, 1942, December 8, 1947 and October 20, 1948, the then Alien Property Custodian seized certain property in which petitioner had an interest. The vested property has been liquidated and $68,537.26 represents petitioner's share of the proceeds (R. 3-4).

On August 8, 1946, Congress amended § 32(a)(2)(D) by providing that vested property may be returned to an individual who, although a citizen and resident of Germany during World War II, did not enjoy full rights of German citizenship as a consequence of a German law, decree or regulation discriminating against political, racial or religious groups, and such return is also determined to

be in the interest of the United States as required by § 32(a)(5) (R. 5). (This requirement was part of § 32 as originally enacted.)

The provisions of § 32(a)(2)(D), as so amended, do not permit the Alien Property Custodian or the Attorney General (for whom the Director of the Office of Alien Property acts) any discretion in determining the eligibility of a former owner of vested property for the return of such property or the proceeds thereof, but only permit discretion in making a return to the former owner once eligibility or qualification has first been affirmatively determined (R. 5).

Petitioner was denied admission to the practice of law, which was a substantial deprivation of his rights as a German citizen, because he was a known opponent of Nazism and considered politically unreliable, and Anti-Nazis or Non-Nazis such as petitioner were recognized and treated as a political group by Nazi authorities and under Nazi laws (R. 5).

On July 26, 1948, deeming himself eligible and qualified for return of vested property under § 32(a)(2)(D), petitioner filed his claim for return. Thereafter a hearing was conducted in the Office of Alien Property before a Hearing Examiner, and the question presented at the hearing was whether petitioner was eligible for return of vested property under § 32(a)(2)(D) (R. 5-6).

The Hearing Examiner rendered a decision concluding that petitioner was eligible for the return of vested property because he failed to enjoy full rights of German citizenship during the period of hostilities as a consequence of German laws, decrees or regulations discriminating against a political group and recommended allowance of the claim (R. 6).

The Director of the Office of Alien Property rejected the Hearing Examiner's recommendation, determined that petitioner was not a member of a "political group" that was discriminated against within the meaning of § 32(a)

(2)(D), and concluded that he was ineligible for return of the vested property. He accordingly disallowed the claim (R. 6). The Attorney General decided not to review and thereupon the Director's decision became final administratively (R. 7).

The complaint specifically alleges in paragraph 17 (R. 6) that the Director's decision

> "misconceived and was not in accordance with and short of the applicable law and was illegal and erroneous in that there was no legal substantial evidence on the record as a whole to support said decision, and was unreasonable, arbitrary and capricious and in express disregard of the object and purpose of Congress to make eligible for the return of vested property those former owners who failed to enjoy full rights of citizenship throughout the period of hostilities as a result of laws of their governments discriminating against political groups."

It is further alleged that petitioner has exhausted his administrative remedy, that there is an actual controversy between him and the Attorney General as to petitioner's eligibility for a return under § 32(a)(2)(D), that should the Director's decision remain final the purpose of Congress as expressed in said section will be circumvented and destroyed, and that no statute precludes judicial review of the decision (R. 7).

The complaint prayed a review of the Director's decision and the action of the respondent in sustaining the decision and a decree setting aside the Director's decision as unlawful, adjudging that petitioner is eligible for the return of his vested property, and directing respondent to determine whether or not a return to petitioner of the property is in the interest of the United States (R. 7-8).

Summary of Argument

I. § 32, as originally added to the Trading with the Enemy Act on March 6, 1946, authorized the return to "technical" enemies of their former property which had been vested for protective purposes. To insure protection of the interests of the United States in those situations in which there was cloaking of enemy interests through "technical" enemies and to bar a return to a "technical" enemy where insufficient reciprocal protection had been afforded by a foreign country of which the former owner was a citizen or subject to American citizens having claims against it, a provision was incorporated requiring, as a condition precedent for return, a determination that such return is in the interest of the United States.

On August 8, 1946, § 32 was amended by the addition thereto of the first proviso of § 32(a)(2)(D) providing for the return of their vested property to enemies who failed to enjoy full rights of citizenship throughout the period of World War II hostilities as a result of laws of their government discriminating against political, racial, or religious groups. Such persons were deemed non-hostile enemies. The first proviso sets forth a condition of *status* which, if occupied by petitioner, entitles him to a determination of eligibility for return.

II. The motion to dismiss concedes the truth of the allegations of the complaint that petitioner was denied admission to the practice of law, a substantial deprivation of his rights as a German citizen, because he was a known opponent of Nazism and considered politically unreliable and that Anti-Nazis or Non-Nazis, such as petitioner, were recognized and treated as a political group by Nazi authorities and under Nazi laws (R. 5). Thus the respondent admits that petitioner occupies the condition of *status* set forth in the first proviso of § 32(a)(2)(D).

The motion also admits the charge in the complaint that the Director's determination that petitioner was not a member of a political group that was discriminated against and concluding that petitioner is ineligible for return of his vested property was not in accordance with the applicable law, illegal, unsupported by substantial evidence, arbitrary and capricious.

III. The Director, Office of Alien Property, is not an autocrat free to act as he pleases in the consideration of petitioner's eligibility for return of his vested property amounting to some $68,000, under § 32, and petitioner, as a matter of law, presumptively has a right of access to the District Court for a review of the Director's decision to determine its validity. § 10 of the Administrative Procedure Act restates in exact statutory language this presumptive right of judicial review as expounded by this Court. Agency action, findings or conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or unsupported by substantial evidence is defined by the Administrative Procedure Act to be a "legal wrong" and deemed unlawful. § 10 provides that except so far as statutes preclude judicial review or agency action is committed by law to agency discretion, any person suffering a "legal wrong" because of agency action shall be entitled to judicial review thereof.

IV. Judicial review of the Director's decision is not precluded by any statute. § 32 of the Trading with the Enemy Act does not on its face preclude it. § 7(c) of that Act, which the Court of Appeals held forbade this suit, does not preclude the judicial review sought by petitioner for the "sole relief and remedy" provision of § 7(c), as this Court has held, relates to property whose seizure and ultimate retention was not authorized by the Trading with the Enemy Act and for whose recovery by a non-enemy an express statutory remedy was provided by § 9(a) of the Act. There is nothing in § 7(c) which precludes peti-

tioner, ineligible to sue for recovery of vested property under § 9(a) because he is an enemy, but eligible for return under the first proviso of § 32(a)(2)(D), from resorting to the District Court for a judicial review of the admittedly illegal decision of ineligibility for return and for which no other remedy is available to him under the Trading with the Enemy Act. Since he has no remedy under that Act, he clearly has a right of judicial review under § 10(c) of the Administrative Procedure Act, which provides that every agency action "for which there is no other adequate remedy in any court shall be subject to judicial review."

V. The agency action sought to be reviewed is not committed by law to agency discretion. A determination of eligibility for return under the first proviso of § 32(a)(2)(D) is not left to the Director's judgment. His function is to find petitioner eligible for return if petitioner comes within the standards fixed by Congress in the first proviso. Assuming, but without conceding, that the Director has discretion, nevertheless, the exercise of discretion does not negative the right to judicial review, and § 10(e)(B)(1) of the Administrative Procedure Act authorizes review for an abuse of discretion. Whether agency action allegedly based upon an exercise of discretion should be set aside by a court after a hearing on the merits and examination of the administrative record is a different question from whether a court may review the agency action for the purpose of determining its validity.

VI. In any event, and apart from the Administrative Procedure Act, a justiciable controversy over a federal statute is presented by the allegations of the complaint, and the District Court has jurisdiction under the general grant of federal-question jurisdiction. Furthermore, since an actual controversy between petitioner and respondent with respect to petitioner's *status, viz.*, eligibility for return is involved, the District Court has jurisdiction to declare such status under the Declaratory Judgment Act.

VII. The authorities relied upon by the Court of Appeals were suits to recover vested property and manifestly inapplicable here. They are also factually distinguishable from this case.

ARGUMENT

I

As respondent's motion to dismiss admits that the Director's decision was illegal, unsupported by substantial evidence, arbitrary and capricious, petitioner has a presumptive right to secure a judicial review of its validity and such presumptive right has been codified by the Administrative Procedure Act.

(a) *The motion to dismiss admits, as a matter of law, the charge in the complaint.*

The complaint charged (R. 6) that the Director's determination that petitioner was not a member of a political group that was discriminated against and is ineligible for return under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act

> "was illegal and erroneous in that there was no legal substantial evidence on the record as a whole to support said decision, and was unreasonable, arbitrary and capricious * * *."

As a matter of law these allegations are admitted by the motion to dismiss.

In *The Chicago Junction Case*, 264 U. S. 258, which held that an order of the Interstate Commerce Commission permitting a railroad company to acquire control of another is void and may be set aside when the Commission's finding that such an acquisition will be for the interest of the public is unsupported by evidence, Mr. Justice Brandeis said (p. 262):

"Plaintiffs contend that the order is void because there was no evidence to support the finding that the acquisition of control of the terminal railroads by the New York Central 'will be in the public interest.' The bill charges, in clear and definite terms, that this finding was wholly unsupported by evidence. We must take that fact as admitted for the purposes of this appeal."

and again (p. 265):

"The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs."

In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, Mr. Justice Burton, who announced the Court's judgment, remanded the cases to the District Court with instructions to deny the defendant's motion to dismiss the complaints upon the ground that the Attorney General by demurring to the complaints had admitted the allegations that his action in listing the plaintiff organizations as "Communist" had been arbitrary.

(b) *Petitioner has a presumptive right to a judicial review of the illegal decision.*

Chief Justice Hughes in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 277, said:

"• • • A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the

> authority conferred. And an inquiry into the fac
> before the Commission, in order to ascertain whethe
> its findings are thus vitiated, belongs to the judici
> province and does not trench upon, or involve the e
> ercise of, administrative authority."

In *Harmon* v. *Brucker*, 355 U. S. 579, a proceeding t review the legality of actions of the Secretary of the Arm in issuing to inductees a discharge certificate in form othe than "honorable" because of the inductees' preinductio activities, the Court of Appeals for the District of Colum bia Circuit had dismissed on the ground that there wa no review jurisdiction. This Court reversed, finding tha review was available and that, on the merits, the Secre tary's action was *ultra vires*. This Court said (pp. 58 582):

> "Generally, judicial relief is available to one wh
> has been injured by an act of a government offici
> which is in excess of his express or implied power
> *American School of Magnetic Healing* v. *McAnnult*
> 187 U. S. 94, 108; *Philadelphia Co.* v. *Stimson*, 23
> U. S. 605, 621-622; *Stark* v. *Wickard*, 321 U. S. 28
> 310. The District Court had not only jurisdiction t
> determine its jurisdiction but also power to constru
> the statutes involved to determine whether the re
> spondent did exceed his powers. If he did so, hi
> actions would not constitute exercises of his admin
> istrative discretion, and, in such circumstances a
> those before us, judicial relief from this illegalit
> would be available."

Most recently, in *Leedom* v. *Kyne*, 358 U. S. 184, whic held that the Court of Appeals for the District of Columbi Circuit "was right in holding" that the District Court ha jurisdiction of the suit to set aside a certification of th National Labor Relations Board made in excess of it powers. Mr. Justice Whittaker, writing for this Cour

said (p. 190):

> "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers. Cf. *Harmon* v. *Brucker*, 355 U. S. 579; *Stark* v. *Wickard*, 321 U. S. 288; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94."

See, Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401, 423 (1958).

(c) *§ 10 of the Administrative Procedure Act, enacted on June 11, 1946, is a codification of the presumptive right to judicial review of illegal agency action as expounded in the above cases.*

The memorandum of the Department of Justice contained in S. Doc. No. 248, 79th Cong., 2d Sess., at 415, states the following:

> "Section 10 [Administrative Procedure Act] as to judicial review does not, in my view, make any real changes in existing law. This section in general declares the existing law concerning judicial review. It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned about the phraseology used in section 10 for fear that it will change the existing doctrine of judicial review which has been settled for the particular agency concerned. I feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there should be no difficulty for any agency. We may in a sense look at section 10 as an attempt by Congress to place into statutory language existing methods of review."

§ 10 provides that, except so far as statutes preclude judicial review, or agency action is by law committed to

agency action 'involves' an element of discretion or judgment. Whether the court should set aside an agency action founded upon the exercise of discretion and judgment is, as we have said, a totally different question from whether the court may review the action for purposes of determining its validity."

In *Adams* v. *Witmer*, 271 F. 2d 29 (9th Cir.), *aff'd on rehearing*, 271 F. 2d 37, the Court, in discussing whether judicial review of agency action "by law committed to agency discretion" is precluded by § 10 of the Administrative Procedure Act, said upon the authority of *Jilmovich* v. *Chapman*, *supra*, that (p. 33):

"The exercise of discretion by the agency does not in itself negative the right to judicial review."

In denying the petition for rehearing, the Court further said (p. 38):

"* * * But the Administrative Procedure Act was enacted to bring 'the decision of controversies * * * back into the judicial system.'"

(d) *§ 32 does not on its face preclude judicial review.*

In the report of the Senate Judiciary Committee, S. Rep. No. 752, 79th Cong., 1st Sess., reprinted in S. Doc. No. 248, 79th Cong., 2d Sess., at page 212, the following is found with respect to § 10 of the Administrative Procedure Act:

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board."

The same statements appear in H. Rep. No. 1980, 79th Cong., 2d Sess., reprinted in S. Doc. No. 248, *supra*, at page 275. This report then states the following:

> "* * * To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review."

Congressman Walter, one of the House sponsors of the Act, said on the floor of the House on May 24, 1946 (S. Doc. 248, *supra*, at p. 368):

> "Two general exceptions are made in the introductory clause of section 10. The first exempts all matters so far as statutes preclude judicial review. Congress has rarely done so. Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial—see *Stark* v. *Wickard* (321 U. S. 288 at p. 317)."

Furthermore, § 12 of the Administrative Procedure Act provides that:

> "* * * No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation *shall do so expressly.*" (Emphasis supplied)

This Court, in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, and *Brownell* v. *We Shung*, 352 U. S. 180, held that the purpose of §§ 10 and 12 of the Administrative Procedure Act was to remove obstacles to judicial review of agency action under subsequently enacted statutes. This Court said in

Brownell v. *We Shung* (p. 185):

> "* * * Furthermore, as we pointed out in Pedreiro, such a 'cutting off" of judicial review 'would run counter to § 10 and § 12 of the Administrative Procedure Act.' [349 U. S. at 51] 'Exemptions from the * * * Administrative Procedure Act are not lightly to be presumed,' *Marcello* v. *Bonds*, 349 U. S. 302, 310, and unless made by clear language or supersedure the expanded mode of review granted by that Act cannot be modified."

The first proviso of § 32(a)(2)(D) was added to § 32 on August 8, 1946, when the Administrative Procedure Act was already in effect, having been enacted on June 11, 1946. Since Congress did not expressly provide that judicial review of a determination of *status* under the first proviso is precluded, it is manifest that Congress, which had shortly before enacted the Administrative Procedure Act, did not intend to bar non-hostile enemies, such as petitioner, from access to the District Court to test the validity of an illegal decision by the Director with respect to their eligibility for return of their former property.

III

Apart from § 10 of the Administrative Procedure Act, since an actual controversy between petitioner and respondent with respect to petitioner's status, viz., eligibility for return under the first proviso of § 32(a)(2)(D), is presented by the charge in the complaint, the District Court also has jurisdiction to declare such status under its general jurisdiction and the terms of the Declaratory Judgment Act.

(a) *A justiciable controversy is presented under a law of the United States within the District Court's general jurisdiction.*

In *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, an action to set aside an order of the Interstate Commerce Commission, in which the United States was also made a defendant because of a statutory requirement, the District Court, composed of three judges, in dismissing the complaint without reaching the merits on the theory that the government could not sue itself (pp. 429, 430) "also indicated its belief that a three-judge court was without jurisdiction of the suit."

In reversing the District Court on a direct appeal, this Court referred to the complaint as follows (p. 429):

> "The complaint charged that the Commission's conclusions were not supported by its findings, that the findings were not supported by any substantial evidence, that the order was based on a misapplication of law and was 'otherwise arbitrary, capricious and without support in and contrary to law and the evidence.'"

In holding that "the established principle that a person cannot create a justiciable controversy against himself has no application here", this Court said (p. 431):

> "But the Government charged that the order was issued arbitrarily and without substantial evidence. This charge alone would be enough to present a justiciable controversy. *Chicago Junction Case*, 264 U. S. 258, 262-266."

Here, too, the charge in the complaint that the Director's decision was illegal, unsupported by substantial evidence, arbitrary and capricious presents a justiciable controversy.

Moreover, the complaint alleges, and the motion to dismiss admits, (1) that petitioner was denied admission to the practice of law, a substantial deprivation of his rights as a German citizen, because he was a known opponent of Nazism and considered politically unreliable, and Anti-Nazis or Non-Nazis, *such as petitioner*, were recognized

agency discretion, any person "suffering legal wrong" because of any agency action shall be entitled to judicial review thereof.

The report of the Senate Judiciary Committee on the Act, S. Rep. No. 752, 79th Cong., 1st Sess., reprinted in S. Doc. No. 248, at 185, defines "legal wrong", as used in § 10(a), in the following language, at page 212:

> "* * * The phrase 'legal wrong' means such a wrong as is specified in subsection (e) of this section."

The same definition of "legal wrong" is contained in the report of the House Judiciary Committee, H. Rep. No. 1980, 79th Cong., 2d Sess., 233, reprinted in S. Doc. No. 248.

§ 10(e) specifies as unlawful any agency action, findings or conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or unsupported by substantial evidence.

Indeed, the Appendix to the letters of Mr. Justice Clark (then Attorney General), dated October 19, 1945, to Senator McCarran (then Chairman of the Senate Judiciary Committee) and Congressman Sumners (then Chairman of the House Judiciary Committee), reprinted in S. Doc. No. 248, *supra*, pages 223 and 406, states that any person "suffering legal wrong because of any agency action * * * shall be entitled to judicial review of such action", and that this "reflects existing law", referring to the *Chicago Junction* case, *supra*, as a case having an important bearing on this subject (pp. 230, 413).

In view of the respondent's admission that the Director's decision was illegal, arbitrary and capricious, and without substantial evidence on the record as a whole to support it, it is clear that respondent concedes that petitioner has thereby suffered a "legal wrong" within the meaning of § 10(a).

Furthermore, § 10(c) of the Act provides that

> "Every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

Since petitioner is a non-hostile enemy, he has no remedy under § 9(a) of the Trading with the Enemy Act, which may be availed of only by non-enemies (*Societe Internationale, etc.* v. *Rogers*, 357 U. S. 197, 211, and cases cited), and, since no adequate remedy is afforded him under the Trading with the Enemy Act to review the Director's determination that he is not eligible under the first proviso of § 32(a)(2)(D) to receive a return of his vested property, it is clear that § 10(c) alone affords petitioner a judicial review of such determination.

Thus the Act clearly authorizes the judicial review which petitioner seeks as to the validity of the Director's decision. Mr. Justice Douglas discussed and espoused judicial review afforded by the Act in *We the Judges* (Doubleday, 1956), at pages 168, *et seq.* and Mr. Justice Clark (then Attorney General) in the Appendix to his letters above referred to said (S. Doc. No. 248 at 414):

> "* * * the Act is intended to express general standards of wide applicability. It is believed that the courts should as a rule of construction interpret the Act as applicable on a broad basis, unless some subsequent act clearly provides to the contrary."

In discussing the Act Mr. Justice Jackson, in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 40-41, said:

> "The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It

contains many compromises and generalities and, no doubt, some ambiguities.

"Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear."

Indeed, the Attorney General has determined that a § 32 proceeding is governed by the Act for, as pointed out by the Chief Hearing Examiner of the Office of Alien Property in *Matter of Hans Kroch, et al.* (40 Consolidated Claims), Docket No. 183, at page 170:

"• • • On May 18, 1955 the Attorney General determined in agreement with the Chairman of the Civil Service Commission that the hearing and decision of claims under Section • • • 32 • • • of the Trading with the Enemy Act must be conducted in accordance with the requirements of the Administrative Procedure Act • • •."

Whether the Director applied the legislative standard for eligibility for return of vested property specified in the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act, whether he acted within the authority conferred, whether there was substantial evidence to support his decision and whether the decision is arbitrary or capricious or otherwise not in accordance with applicable law, are questions for judicial decision, especially where, as here, the finding of the Hearing Examiner and the Director as to petitioner's status are in conflict.

Universal Camera Corp. v. *National Labor Relations Board*, 340 U. S. 474;

In re *United Corporation*, 249 F. 2d 168 (3d Cir.).

See, also:

Estep v. *United States*, 327 U. S. 114;
Stark v. *Wickard*, 321 U. S. 288;
Federal Radio Commission v. *Nelson Bros., B. & M. Co.*, 289 U. S. 266, 276-277;
Fleming v. *Moberly Milk Products Co.*, 82 U. S. App. D. C. 16, 160 F. 2d 259, 265.

II

§32 of the Trading With the Enemy Act does not permit any discretion in determining eligibility for return of vested property and does not preclude judicial review of the Director's decision.

(a) *The Congressional intent in enacting Section 32 of the Act after World War II.*

By Section 12 of the Act, 40 Stat. 423, 50 U.S.C. App. § 12, 50 U.S.C.A. App. § 12, property owned by "enemies" and therefore not subject to recovery under Section 9(a) was reserved for disposition "[a]fter the end of the war • • • as Congress shall direct."

The amendment of Section 5(b) of the Act by Title III of the First War Powers Act of December 18, 1941, 55 Stat. 841, 50 U.S.C. App. § 5(b), 50 U.S.C.A. App. § 5(b), authorized the vesting of any property or interest of any foreign country or national thereof. Therefore, the Custodian seized, for protective purposes, property belonging to persons who were not citizens of enemy countries but who were resident in enemy or enemy-occupied territory. Since there was no longer any justification after World War II for retaining property which belonged to nationals of friendly countries, but who were "technical" enemies during World War II, Congress amended the Trading with the Enemy Act by adding thereto § 32 authorizing the return to its former owners of property which was

owned at the time of vesting by certain categories of foreign nationals who were never hostile to the United States, including nationals of countries occupied by the enemy whose property was vested only for protective purposes, and also authorizing the restoration of property to American citizens in those situations where technical authority to vest existed because of the claimants' former residence in enemy or enemy-held territory, but where there was no present reason for retention. (H. Rep. No. 1269, 79th Cong., 1st Sess.)

Since it was well known that German property was cloaked through "technical" enemies, § 32(a)(5) was incorporated as a safeguard to "insure protection of the interests of the United States in seeing to it that returns" would not be made "in situations in which cloaking of enemy interests may have occurred" (Statement of Willard L. Thorp, then Deputy to Assistant Secretary of State Clayton, Hearing before Subcommittee No. 1 of the House Committee on the Judiciary, 79th Cong., 1st Sess. on H. R. 3750, September 12, 1945) and "to bar a return to a 'technical' enemy where in the judgment of the State Department, for example, insufficient reciprocal protection had been afforded by a foreign country to American citizens having claims against it" (H. Rep. No. 1269, 79th Cong., 1st Sess., at page 6, reprinted in 1946 U. S. Code Cong. Serv. 1101, 1105).

(b) *The Congressional intent in amending, on August 8, 1946, Section 32(a)(2)(D) by adding thereto the first proviso thereof.*

By the Act of August 8, 1946, c. 878, § 2, 60 Stat. 930, Congress amended § 32(a)(2)(D) by providing for the return of vested property to an individual who, although a citizen and resident of Germany during World War II, did not enjoy full rights of German citizenship as a consequence of a German law, decree or regulation discriminating against political, racial or religious groups.

John Ward Cutler, associate general counsel, Office of Alien Property Custodian, who testified on July 1, 1946, before the Subcommittee of the Committee on the Judiciary of the United States Senate, 79th Cong., 2d Sess., which then had before it S. 2039, to amend § 32(a), and S. 2378, to amend the First War Powers Act, 1941, 55 Stat. 838, pointed out to the Subcommittee (Hearings p. 12) that it was intended by the proposed amendment to release vested property "in the case of victims of Axis oppression who were deprived of life or civil rights by discriminatory legislation against *political*, racial, or religious *groups* in the country * * * of which they were nationals", and that it was intended by the proposed amendment to release vested property where the former owner thereof "opposed the Nazi cause" and was, in fact, persecuted by the Germans, but that by the proposed amendment "there will be no return to anybody who was in fact in favor of the Nazi cause". (Emphasis supplied)

In Senate Report No. 600, 82d Cong., 1st Sess., on S. 1748, the purpose of the first proviso of § 32(a)(2)(D) is expressed in the following language (at p. 2):

> "On August 8, 1946, the Congress of the United States, by enactment of an amendment to section 32(a)(2) of the Trading With the Enemy Act, sought to provide for the release of property vested in the Alien Property Custodian, where it was apparent that the former owner of the assets was an individual who 'was deprived of life or substantially deprived of liberty pursuant to any law, decree or regulation * * * discriminating against political, racial, or religious groups * * *, in an enemy country.
>
> "By this amendment a necessary and clear-cut distinction was effected between the property of those individuals who were in fact our enemies in the last war, and those who by their extreme persecution at the hands of their governments were the 'enemies of our enemies' and our own allies."

The same statement is found on page 1 of Senate Report No. 784, 81st Cong., 1st Sess., on S. 603, which contains the following (at p. 4):

> "The general approach incorporated in this proposed legislation represents also the only humanitarian one and the only realistic one possible in view of the extraordinary experiences of these persecuted groups over the last 15 years and the extraordinary present-day needs of the survivors. *These victims of persecution, it should be remembered, were treated as a group or 'community'* • • •. Indeed, their property was taken by the United States because they were part of a large political group (i.e., enemy nationals). *To refuse to treat them as a group or community when* there is a possibility of their receiving aid and to emphasize their individuality only when it becomes a barrier to receiving a benefit *is an injustice which the Government of the United States should be avid to avoid.*" (Emphasis supplied)

In House Report No. 2338, 81st Cong., 2d Sess., on S. 603, it is stated (at page 2):

> "The proposed legislation carries out already established policies of this Government. It was passed unanimously by the Senate, during the first session of this Congress.
>
> "The first legislative step in the establishment of these policies was taken on August 8, 1946, when there was enacted into law an amendment to section 32(a)(2) of the Trading with the Enemy Act providing for the return of property vested by the Alien Property Custodian where it appeared that the former owner was an individual who 'was deprived of life or substantially deprived of liberty pursuant to any law, decree or regulation • • • discriminating against political, racial, or religious groups' in an enemy country.

"This amendment established a clear-cut *distinction* between the property of those persons who were in fact our enemies during the last war, and *those who*, as evidenced by their extreme persecution at the hands of their governments, *were in fact the enemies of our enemies. It was thus made clear that the intention of the United States was not to profit from the assets of the latter class of individuals.*" (Emphasis supplied)

In the Final Report of the Senate Subcommittee to Examine and Review the Administration of the Trading with the Enemy Act of the Committee on the Judiciary, pursuant to S. Res. 245, 82d Cong., 2d Sess., as amended by S. Res. 47, 83d Cong., 1st Sess., approved January 30, 1953, and S. Res. 120, approved June 24, 1953, the purpose of the first proviso of Section 32(a)(2)(D) is stated, at page 6, as follows:

> "In 1946, section 32 was added to the act to provide for administrative return of certain vested property. Under this section, citizens of friendly countries who are enemies under section 2 of the act solely because of their residence in enemy-occupied territory, as well as enemy citizens who had been persecuted for political, racial, or religious reasons, can have their former property returned to them."

The Deputy Director of the Office of Alien Property has stated that:

> "... Under [section 32] ... enemy citizens who had been persecuted for political, racial or religious reasons could have their former property returned to them." (Hearings, Administration of the Trading with the Enemy Act, 83rd Cong., 1st Sess., p. 104.)

Manifestly, Congress intended that if non-hostile enemies, such as petitioner, come within the standards specified in the first proviso of § 32(a)(2)(D) for determining

their eligibility for return they "can have their former property returned to them."

(c) *§ 32 does not permit any discretion in determining eligibility for return.*

There are two stages in the administrative process under § 32. The first stage is one whereby the Director must make a determination as to whether a claimant comes within a class of persons eligible for return under the first proviso of § 32(a)(2)(D). The second stage is one whereby, after having first determined that a claimant is eligible, the Director must determine under § 32(a)(5) whether a return of vested property to the claimant is in the interest of the United States. The first stage, which is here involved, is not discretionary for if a claimant, such as petitioner, establishes that he failed to enjoy full rights of German citizenship throughout the period of hostilities as a result of German laws discriminating against political, racial or religious groups, the Director, as Congress intended, must determine him to be eligible for return. In such case the Director has no authority to determine him ineligible for return.

Assuming for the discussion, but without conceding, that a determination of eligibility for return under the first proviso of § 32(a)(2)(D) is discretionary, § 10(e) of the Administrative Procedure Act makes manifest that a determination of non-eligibility for return is judicially reviewable for it is there provided that agency action may be held unlawful and be set aside if not only arbitrary, capricious and without substantial evidence to support it, but also for "an abuse of discretion or otherwise not in accordance with law".

Senator McCarran, when he was explaining the provisions of § 10 of the Act on the floor of the Senate on March 12, 1946, was closely questioned by Senator Donnell about this matter and the following colloquy took place (S. Doc.

No. 248, *supra*, p. 311):

"Mr. Donnell: But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

"Mr. McCarran: It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning."

Congressman Walter, one of the House sponsors of the Act, in explaining § 10, said on the floor of the House on May 24, 1946 (S. Doc. No. 248, *supra*, at p. 368):

"* * * There have been much misunderstanding and confusion of terms respecting the discretion of agencies. They do not have authority in any case to act blindly or arbitrarily. They may not wilfully act or refuse to act. Although like trial courts they may determine facts in the first instance and determine conflicting evidence, they cannot act in disregard of or contrary to the evidence or without evidence. They may not take affirmative or negative action without the factual basis required by the laws under which they are proceeding."

In *Homovich* v. *Chapman*, 89 U. S. App. D. C. 150, 153, 191 F. 2d 761, 764, the Court of Appeals said:

"* * * The Administrative Procedure Act (Section 10) forbids judicial review only where statutes 'preclude' such review or where agency action is 'by law committed to agency discretion.' No statute 'precludes' this review, and the Secretary would have us stretch the second prohibitory clause far beyond its meaning. He says that there can be no review where agency action 'involves' discretion or judgment. Obviously the statute does not mean that; almost every

and treated as a political group by Nazi authorities and under Nazi laws (R. 5), and (2) that the Hearing Examiner concluded that petitioner is eligible for the return of vested property under § 32 because he failed to enjoy full rights of German citizenship during the period of hostilities as a consequence of German laws, decrees or regulations discriminating against a political group (R. 6).

In support of the Director's decision, contrary to that of the Hearing Examiner, the respondent has consistently taken the position, as stated at page 12 of his brief in opposition to the petition for certiorari herein, that "the interpretation of Section 32 is within" the authority of the Attorney General or his delegate, and that whether the petitioner was a member of a "political group" which had been discriminated against is "a question of the construction of Section 32", and the fact, as alleged in the complaint, that the Nazis treated Anti-Nazis or Non-Nazis, such as plaintiff, as a political group "does not mean that the petitioner was a member of such a 'group' for purposes of Section 32."

Manifestly, the suit involves a controversy between petitioner and respondent respecting the construction of the first proviso of § 32(a)(2)(D) upon which petitioner's status of eligibility for return of his vested property, amounting to some $68,000, depends. This controversy over a law of the United States is within the general jurisdiction of the District Court.

28 U.S.C. § 1331, 28 U.S.C.A. § 1331;
McGrath v. *Kristensen*, 340 U. S. 162, 169.

In *Bell* v. *Hood*, 327 U. S. 678, 685, this Court said:

> "Thus, the right of the petitioners to recover under their complaint will be sustained if the * * * laws of the United States are given one construction and will be defeated if they are given another. For this reason

the district court has jurisdiction. *Gully* v. *First National Bank*, 299 U. S. 109, 112, 113; *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 199, 200."

Tennessee v. *Davis*, 100 U. S. 257, 264;
Schulthis v. *McDougal*, 225 U. S. 561, 569;
The Fair v. *Kohler Die Co.*, 228 U. S. 22, 25.

In view of the foregoing, petitioner presumptively has a right to a judicial review of the Director's decision and a judicial construction of the first proviso of § 32(a)(2)(D) and, therefore, the District Court has jurisdiction of the suit.

(b) *The District Court has jurisdiction under the Declaratory Judgment Act.*

Mr. Justice Reed, in delivering this Court's opinion in *McGrath* v. *Kristensen*, 340 U. S. 162, said (p. 169):

"We do not find it necessary to consider the applicability of § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C.A. § 1009, to this proceeding. Where an official's authority to act *depends upon the status of the person affected*, in this case *eligibility* for citizenship, *that status*, when in dispute, *may be determined by a declaratory judgment proceeding* after the exhaustion of administrative remedies. Under § 19(c) of the Immigration Act the exercise of the Attorney General's appropriate discretion in suspending deportation is prohibited in the case of aliens ineligible for citizenship. The alien is determined to have a proscribed status by this administrative ruling of ineligibility. Since the adminstrative determination is final, the alien can remove the bar to consideration of suspension only by a judicial determination of his eligibility for citizenship. This is an actual controversy between the alien and immigration officials over the *legal right of the alien to be considered* for

suspension. *As such a controversy over federal laws, it is within the jurisdiction of federal courts*, 28 U.S.C. § 1331, 28 U.S.C.A. § 1331, *and the terms of the Declaratory Judgment Act*, 28 U.S.C. § 2201, 28 U.S.C.A. § 2201." (Emphasis supplied.)

So, here, the Director's authority to act under § 32(a) of the Trading With the Enemy Act, namely, return vested property, "depends upon the status of the person affected, in this case eligibility for" return; "that status, when in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies." Here, too, there "is an actual controversy between" petitioner and respondent "over the legal right of" petitioner "to be considered for" return of his vested property and as "such a controversy over federal laws, it is within the jurisdiction of federal courts * * * and the terms of the Declaratory Judgment Act * * *."

In *McGrath* v. *Kirstensen*, this Court relied upon its prior decision in *Perkins* v. *Elg*, 307 U. S. 325, as appears from the following language in the opinion of Mr. Justice Reed (340 U. S. at pp. 169-171):

> "It was so held in Perkins v. Elg, 307 U. S. 325, where a declaratory judgment action was brought against the Secretary of Labor, then the executive official in charge of deportation of aliens, the Secretary of State, and the Commissioner of Immigration, to settle citizenship status. The Department of Labor had notified Miss Elg, who was not in custody, that she was not a citizen and was illegally remaining in the United States, and the Department of State had refused her a passport 'solely on the ground that she had lost her native born American citizenship'. The District Court sustained a motion to dismiss the proceeding against the Secretary of State because his function as to passports was discretionary, but declared against the contention of the Secretary of Labor

and held that Miss Elg had not lost her American citizenship. On appeal, the Court of Appeals for the District of Columbia affirmed both the dismissal of the Secretary of State from the proceeding and the holding that Miss Elg was a citizen, and also determined that the case was properly brought within the Declaratory Judgment Act. Perkins v. Elg, 69 App. D. C. 175, 99 F. 2d 408. The United States raised no question on its petition for certiorari as to the propriety of the declaratory judgment action. Miss Elg, however, obtained certiorari from the dismissal of the proceeding against the Secretary of State, and the United States defended the judgment of dismissal on the ground that the Declaratory Judgment Act did not add to federal court jurisdiction but merely gave an additional remedy. In the Government's brief it was said judicial jurisdiction would be expanded without warrant 'by permitting the court to substitute its discretion for that of the executive departments in a matter belonging to the proper jurisdiction of the latter.' We rejected that contention and reversed the Court of Appeals on this point, saying, 'The court below, properly recognizing the existence of an actual controversy with the defendants (Aetna Life Ins. Co. of Hartford v. Haworth, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617), declared Miss Elg "to be a natural born citizen of the United States," and we think that the decree should include the Secretary of State as well as the other defendants. *The decree* in that sense *would in no way interfere with the exercise of the Secretary's discretion* with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship.' 307 U. S. 349-350, 59 S. Ct. 884, 896, 83 L. Ed. 1320." (Emphasis supplied.)

Mr. Justice Jackson in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123,

cited *Perkins* v. *Elg*, for the following statement (p. 185):

> "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally."

and said in the footnote:

> "That was an action to mandamus the Secretary of State to issue a passport, to which it was conceded Miss Elg had no legal right, its issuance being wholly within Executive discretion which the courts would not attempt to control. Chief Justice Hughes pointed out, however, that its denial to Miss Elg was not grounded in the Secretary's general discretion but 'solely on the ground that she had lost her native born American citizenship.' Finding that ground untenable, this Court directed its decree against the Secretary. The Secretary might say she would get no passport, *but he could not, for unjustifiable reasons, say she was ineligible for one.*" (Emphasis supplied.)

Here, too, the Director cannot, for unjustifiable reasons, say petitioner is ineligible for return of his vested property.

IV

The amendment of § 7(c) of the Trading with the Enemy Act, adopted November 4, 1918, providing that the "sole relief and remedy" for restoration of property erroneously seized by the Alien Property Custodian as enemy property shall be a suit under § 9(a), does not preclude review by the District Court of the Director's illegal determination of petitioner's status in a proceeding for the benefit of nonhostile enemies under § 32 of the Act, enacted in 1946.

In *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, this Court considered the authority of the Alien Property Custodian with respect to seizures of property determined by him to belong to or to be held for the

benefit of enemies, holding that Section 7(c) of the Act, as amended by the Act of November 4, 1918, requires an immediate transfer of property to the Custodian on demand after he has determined that it is enemy property without awaiting resort to the courts, whether his determination be right or wrong. Mr. Justice Holmes referred to "the sole relief and remedy" provision of Section 7(c) in the following language (at p. 568):

> "* * * By the Act of November 4, 1918, c. 201, 40 Stat. 1020, Section 7(c) was amended among other things by adding after the requirements of transfer 'or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.' This shows clearly enough the peremptory character of this first step. It cannot be supposed that a resort to the Courts is to be less immediately effective than a taking with the strong hand. * * * By a later paragraph 'the sole relief and remedy of any person having any claim to any * * * property' transferred to the Custodian 'or required so to be, or seized by him shall be that provided by the terms of this Act.' The natural interpretation of this clause is that it refers to the remedies expressly provided, in this case by section 9; that property required to be transferred and property seized stand on the same footing, not that the resort by the Custodian to the Courts instead of to force opens to the person who has declined to obey the order of the statute or who has prevented a seizure a right by implication to delay what the statute evidently means to accomplish at once."

In *Commercial Trust Co. of New Jersey* v. *Miller*, 262 U. S. 51, the Alien Property Custodian sued to obtain possession of securities and money belonging to an alien enemy in the hands of a trustee which claimed the right

to have the property interests judicially determined by a court of equity before a right to the possession of the property could be asserted by the Custodian. In affirming an order of the Circuit Court of Appeals which had affirmed a decree of the District Court directing the trustee to transfer the property to the Custodian, this Court, on the authority of *Central Union Trust Co.* v. *Garvan* and *Stochr* v. *Wallace*, 255 U. S. 239, said (at p. 56):

> "Those cases decide, as we have also seen, that the suit is as of peremptory character as 'seizure in pais' and is the dictate and provision for the emergency of war, not to be defeated or delayed by defenses; its only condition, therefore, being the determination by the Alien Property Custodian that it was enemy property. It was recognized that there is implication in the act that mistakes may be made, but it, the act, assumes 'that the transfer will take place whether right or wrong.' In other words, it is the view of the opinions that the act provides for an exercise of government, but also provides, as we have said, redress for mistakes in its exercise by the claimant of the property filing a claim under section 9 * * * which, if not yielded to, may be enforced by suit."

In referring to the amendment to Section 7(*e*) adopted on November 4, 1918, Mr. Justice Cardozo (then Judge) in *Miller* v. *Lautenburg*, 239 N. Y. 132, said (at p. 135):

> "The Trading with the Enemy Act of October 6, 1917 (40 Stat. 411, ch. 106), and Executive Orders made under its authority empower the President or his delegate, the Alien Property Custodian, to make demand for the conveyance or delivery of any property which the President of this said delegate may determine to be enemy owned. Obedience to a de-

mand so made becomes thereupon the duty of the owner or his agent. If the act had been left in this form, there would have been opportunity for argument that upon a refusal of a conveyance or delivery, the Custodian would be helpless without the aid of a judgment of a court. An amendment was accordingly adopted on November 4, 1918 (40 Stat. 1020, ch. 201, § 7c), which clothes the Custodian with the power to seize. Property brought into his possession either through compliance with the demand or through 'a taking with the strong hand' (*Central Union Trust Co. of N. Y.* v. *Garvan*, 254 U. S. 554, 568), he is to hold with the same powers as those of a common-law trustee, including, specifically, the power to dispose thereof by sale or otherwise as if an absolute owner (Trading with Enemy Act, § 12, as amended by the Appropriation Act of March 28, 1918, 40 Stat. 460, ch. 28). The power to sell is subject, indeed, to a single limitation. If a claim for restitution is filed either by the putative enemy or by another, the property, unless returned, must be held by the Custodian intact until the merits of the claim have been judicially determined (*Central Union Trust Co.* v. *Garvan*, *supra*, p. 568; Trading with the Enemy Act, § 9). In default of such a claim, rights and remedies are transferred from the thing itself to the proceeds (§ 7c, as amended November 4, 1918, 40 Stat. 460, ch. 28). These provisions have been upheld by the Supreme Court as a valid exercise of the war power (*Central Union Trust Co.* v. *Garvan*, *supra*; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co. of N. J.* v. *Miller*, 262 U. S. 51). Under the rulings of that court the determination by the delegate of the President that the property is enemy owned has the same force as a like determination by the President himself. The determination, though not conclusive, has *prima facie*

a validity that suffices to sustain a transfer of possession. If it is challenged as erroneous, there may be contest and restitution (*Central Union Trust Co. v. Garvan, supra,* p. 567; *Commercial Trust Co. of N. J. v. Miller, supra,* p. 55)."

Thus the Trading with the Enemy Act authorized through executive action speedy capture of all enemy property within the United States, and the Custodian was authorized to take possession of such property by whomsoever it might be held whenever, after investigation, he had determined the property to belong to, or to be held for, or on account of, or for the benefit of, an enemy or ally of an enemy. Congress intended by Section 7(c) that possession of such property should be delivered to the Custodian and litigation had upon non-enemy claims to the property seized after the property had come into the Custodian's possession by a suit against the Custodian under Section 9(a). As stated by Mr. Justice Stone in *Becker Steel Co. of America* v. *Cummings,* 296 U. S. 74, 79:

"Section 7 of the Trading with the Enemy Act conferred on the Alien Property Custodian authority summarily to seize property upon his determination that it was enemy owned, and such a seizure was lawful even though the determination were erroneous. *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554; *Stoehr* v. *Wallace,* 255 U. S. 239; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51. But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends. See *Henkels* v. *Sutherland, supra,* 301. Instead by section 9(a) it gave the non-enemy owner the right to maintain a suit for the recovery of the seized property or its proceeds, and at the same time by the all-inclusive language of section 7(c) it denied to him any other remedy."

See:

Guessefeldt v. *McGrath*, 342 U. S. 308, 313, 318;
Clark v. Uebersee Finanz-Korp., 332 U. S. 480, 483;
Societe Internationale, etc. v. *Rogers*, 357 U. S. 197, 211.

These decisions and the provision of Section 7(c) that the "sole relief and remedy" of any person having any claim to vested property "shall be that provided by the terms of this Act" relate to property whose seizure and ultimate retention was not authorized by the Act and for whose recovery by a non-enemy an express statutory remedy was provided by § 9(a). Nothing in them appears to preclude petitioner, ineligible under § 9(a) to sue for the recovery of vested property because he is an enemy within the meaning of § 2 of the Act, but eligible for the return of such property under the first proviso of § 32(a)(2)(D), from seeking judicial review of an admittedly illegal, arbitrary or capricious administrative determination of ineligibility under the first proviso of § 32(a)(2)(D) and for which no other remedy is available under the Trading with the Enemy Act.

V

The decisions of the Court of Appeals in *McGrath* v. *Zander*, 85 U. S. App. D. C. 334, 177 F. 2d 649, and *Legerlotz* v. *Rogers*, 105 U. S. App. D. C. 256, 266 F. 2d 457, involved suits to recover vested property and not, as here, suits seeking a judicial review of a determination of ineligibility for return under the first proviso of § 32(a)(2)(D) of the Trading with the Enemy Act, and, therefore, are inapplicable.

In *McGrath* v. *Zander* the suit sought to recover vested property under § 9(a) on the ground that Mrs. Zander was not an "enemy or ally of enemy" within the meaning of § 2 of the Act, not being a "resident within the territory" of Germany at any time during World War II. The

nature of the suit is stated in the opinion (177 F. 2d at 651):

> "The interest of appellee [Mrs. Zander] in said estate * * * was seized and vested in the Alien Property Custodian * * *. The present controversy arises out of Mrs. Zander's suit in the District Court to recover that fund."

She based her claim on an alternative count which rested upon § 32(a), and allegations that she had filed a claim with the Custodian for return of the vested property and, although entitled thereto, the claim had been refused. The District Court assumed jurisdiction under § 10(a) of the Administrative Procedure Act, treating the action taken by the Custodian as a final determination and refusal of the claim. The Court of Appeals held that she was not an "enemy" since she was never "resident within" Germany and that, therefore, she was entitled to recover under § 9(a) of the Act, stating (177 F. 2d at 651) that § 7(c) "limits the means of reclaiming seized property" to the relief or remedy provided by the Act and "the only judicial remedy for reclaiming vested property" is provided by § 9(a).

Furthermore, there was no administrative determination of ineligibility involved, as is apparent from the following excerpts from the Government's brief in the Court of Appeals in that case:

> "Although the court was apparently under the impression that it was reviewing a determination of the Alien Property Custodian that appellee is a citizen or subject of Germany (Joint App. 29), the record does not support such a conclusion. The Custodian *has never made a determination to that effect*, nor has it made any other determination in respect of appellee's claim under Section 32." (p. 3) (Emphasis supplied.)
>
> * * * * *
>
> "The court below erred in concluding that appellee was entitled to a return of property under Section 32 of the Trading With the Enemy Act when findings

No. 319

In the Supreme Court of the United States

OCTOBER TERM, 1959

WALTER SCHILLING, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
DALLAS S. TOWNSEND,
ROBERT KRAMER,
Assistant Attorneys General,
IRVING JAFFE,
GEORGE B. SEARLS,
VICTOR R. TAYLOR,
Attorneys,
Department of Justice, Washington 25, D.C.

explicitly prerequisite to such a return had not been made." (p. 9)

* * * * *

"The court below rested jurisdiction on Section 10 of the Administrative Procedure Act of 1946, but that Act is not applicable. * * * There has been no determination whatsoever of appellee's claim under Section 32, and, *a fortiori*, no final determination." (p. 9)

* * * * *

"The court stated it was reviewing a determination of the Alien Property Custodian that appellee is 'a citizen or subject of Germany within the meaning of Section 32 of the Trading With the Enemy Act.' *No such determination has been made.*" (p. 14) (Emphasis supplied.)

* * * * *

"*No determination of the claim under Section 32 has been made.*" (pp. 14-15) (Emphasis supplied.)

The Court of Appeals recognized, as contended by the Government, that no determination of the claim under § 32 had been made for the opinion states (p. 652):

"We may also add, without extending this opinion by any detailed reference to the record, that in our judgment there was no final determination or refusal of the claim by the Custodian, and no action that can properly be so construed. Hence, at all events, there was no exhaustion of the administrative remedy, an essential condition to judicial review."

In *Legerlotz* v. *Rogers*[1] the plaintiff also sued to recover vested property under § 9(a) of the Trading with the

[1] This Court granted a writ of certiorari in *Legerlotz* v. *Rogers*, No. 213, October Term, 1959. We have been informed by counsel for Legerlotz that the cause will not come on for argument before this Court because an agreement has been reached with the Office of Alien Property for payment in full of his claim.

Enemy Act and the "main issue" in the case was "whether the plaintiff's suit under § 9(a) was timely brought" (266 F. 2d at 458).

It appears from the record of that case in the Court of Appeals that the Attorney General had determined Legerlotz to be eligible for return, had published a notice of intention to return his property, a return order was issued, and after making substantial payments thereunder, the Attorney General, some 6½ years later, published an amended return order, retaining a portion of the property, upon a determination that return of such amount would not be in the interest of the United States by reason of paragraph 6c of the Memorandum of Understanding between the Government of the United States and the Provisional Government of France, known as the Byrnes-Blum Agreement for "Reverse Lend-Lease". Thus, Legerlotz was determined to be eligible for return.

Surely, these decisions upon which the Court of Appeals relied are not applicable authorities here.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed and the cause remanded to that Court with instructions to affirm the order of the District Court denying the respondent's motion to dismiss the complaint.

Respectfully submitted,

HENRY I. FILLMAN,
Counsel for Petitioner,
[illegible]0 Broadway,
New York 5, N. Y.

APPENDIX

1. Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App. § 1, *et seq.*, 50 U.S.C.A. App. § 1, *et seq.*:

§ 2. **Definitions**

The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * *

§ 7. * * *

* * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property

thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * *

§9. **Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover**

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the pay-

ment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United

States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

§ 32. **Return of property**—(a) Conditions precedent The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the

provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation: • • •

• • • • • •

(5) that such return is in the interest of the United States.

• • • • •

§ 39. • • •

(a) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act • • •.

2. The Declaratory Judgment Act, as amended August 28, 1954, c. 1033, 68 Stat. 890, 28 U.S.C., § 2201 (Supp. V), 28 U.S.C.A. § 2201:

§ 2201. **Creation of remedy.**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court

of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

3. § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C., § 1009, 5 U.S.C.A. § 1009:

§ 1009. **Judicial review of agency action.**

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable.

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review.

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant

questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

4. § 12 of the Administrative Procedure Act, 60 Stat. 244, 5 U.S.C. § 1011, 5 U.S.C.A. § 1011:

§ 1011. Impairment of rights; effect on other laws; separability; subsequent legislation; effective date

* * * * *

* * * No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly.

5. Act of June 25, 1948, c. 646, § 1, 52 Stat. 930, 28 U.S.C. § 1331, 28 U.S.C.A. § 1331:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

INDEX

CITATIONS

540599—60——1

Cases—Continued

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 12–13) is reported at 268 F. 2d 584. The administrative decisions of the Hearing Examiner and of the Director, Office of Alien Property, are reprinted in Appendix B, *infra*, pp. 37–50.

JURISDICTION

The judgment of the Court of Appeals was entered on May 21, 1959 (R. 14). The petition for a writ of certiorari was filed on August 18, 1959, and was granted by this Court on October 26, 1959 (R. 15; 361 U.S. 784). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

Petitioner's brief sets out most of the relevant statutory provisions. In addition, we reprint (Appendix A, *infra*, pp. 33–36) Section 9(f) of the Trading with the Enemy Act, the relevant parts of Sections 32(d), 32(f) and 39 of that Act, and the complete text of Section 12 of the Administrative Procedure Act (5 U.S.C. 1011).

QUESTION PRESENTED

Whether a district court has jurisdiction under the Administrative Procedure Act, the Federal Declaratory Judgment Act, or any other provision of law to review an administrative decision under Section 32 of the Trading with the Enemy Act which holds that an applicant is not a persecuted person eligible for the return of vested property under the provisions of Section 32(a)(2)(D).

STATEMENT

On July 26, 1948, petitioner filed a Notice of Claim with the Alien Property Custodian seeking a return of vested property under Section 32(a)(2)(D) (Pet. Br. 44–45) of the Trading with the Enemy Act. Although that Section states a general prohibition against the return of vested property to German citizens present in Germany after December 7, 1941, it contains a proviso (enacted in August 1946) which declares that "return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7,

1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation."[1]

The allegations upon which petitioner relied in making his claim may be summarized briefly as follows (see petitioner's District Court complaint, R. 3–5). Petitioner, at all relevant times, was a resident and citizen of Germany. Property which he owned or in which he had an interest was vested under the Trading with the Enemy Act by the respondent's predecessors in 1942, 1947 and 1948. During the Hitler regime in Germany, petitioner was denied admission to the practice of law. This was a substantial deprivation of his rights as a German citizen, imposed upon him because he was a known opponent of Nazism and considered politically unreliable. Anti-Nazis or non-Nazis, such as petitioner, were recognized and treated as members of a political group by Nazi authorities and under Nazi laws.

The claim was heard in due course by a Hearing Examiner, who recommended that it be allowed.[2] The

[1] A further requirement, applicable to all returns under Section 32, is that it be determined to be "in the interest of the United States." Section 32(a)(5).

[2] The decisions of the Hearing Examiners and of the Director on claims are available for inspection and for distribution. *Regulations of the Office of Alien Property*, 8 C.F.R. (1958 Revision), § 503.1.

Under the Regulations, the rules of evidence are not controlling (§ 502.13(i)) and claims are frequently submitted entirely on documentary evidence. In this case, according to the Examiner, the record consisted of documentary evidence, except for one witness called by claimant to testify as to conditions in Germany (Appendix B, *infra*, pp. 37–38).

Examiner found (Appendix B, *infra*, p. 39) that petitioner had trained for the legal profession; that he was advised that he could not hope for a career in that profession unless he became a member of the Nazi Party;[3] that he nevertheless refused to support the Nazi movement and that he rejected an invitation to join the Party; and that between 1940 and the end of hostilities, knowing that he would not be licensed to practice law, he worked, first, as a legal assistant or clerk in a law firm and, later, as an employee of an industrial firm, serving in a legal capacity. The Examiner concluded (Appendix B, *infra*, pp. 41–45) that petitioner's exclusion from the general practice of law was a substantial deprivation of his rights as a German citizen and that the discrimination which he suffered was directed against a political group composed of those who declined an invitation to join the Nazi Party.

The Director rejected the Examiner's recommendation and disallowed the claim (Appendix B, *infra*, pp. 45–50). He agreed with the Examiner that those who were not members of the Nazi Party were, as a practical matter, excluded from entry into the practice of law. It was his conclusion, however, that Section 32(a)(2)(D) was purposefully restricted by Congress to persecuted minorities. He held further that Non-Nazis and Anti-Nazis, as such, did not constitute a political group within the meaning of that Section.

---

[3] According to the Examiner, Party membership was limited to about ten percent of the German population (Appendix B, *infra*, p. 42).

The Attorney General determined not to review the decision of the Director and that decision, as an administrative matter, became final (R. 7).

Petitioner, on July 8, 1958, filed a complaint in the District Court for "judicial review of federal agency action" (R. 3), reciting the facts summarized above, and alleging that the Director's decision was illegal and arbitrary.

Respondent moved to dismiss the complaint for want of jurisdiction (R. 8). The District Court denied the motion by an order dated October 8, 1958 (R. 9). The findings necessary for an interlocutory appeal under Section 1292(b) of Title 28, U.S.C., having been made in that order, and the Court of Appeals having granted leave to appeal, an appeal was taken from the order denying the motion to dismiss (R. 9, 11). On May 21, 1959, the Court of Appeals reversed and remanded the cause with directions to dismiss for want of jurisdiction (R. 14).

SUMMARY OF ARGUMENT

I

Petitioner is a resident and national of Germany and hence an "enemy" under the Trading with the Enemy Act ineligible to sue for the recovery of property vested under that Act (Section 9(a)). It is the general scheme of the statute that seized enemy property is to be used to satisfy the claims of American nationals who suffered from the wartime acts of the Axis powers and that the former owners of vested

property shall look to their own governments for compensation. By treaty, Germany has recognized its duty to compensate German nationals whose property was seized by the United States during World War II.

Section 32, under which petitioner filed an administrative claim, is an act of grace whereby Congress provided (in 1946) that certain classes of technical enemies, *e.g.*, persecuted minorities treated as virtual outlaws by the Hitler regime, might secure a return from the United States if the President or his delegate determined that such a dispensation was in this country's interest. In the instant case, the Director of the Office of Alien Property determined that petitioner did not fall within the categories of persons eligible for such a return. The sole question is whether his determination is judicially reviewable.

The background and history of Section 32—a measure which was considered at great length by the Congress—establish that Congress was fully aware that the Trading with the Enemy Act does not permit suits by enemies. The history establishes further that Congress, in enacting Section 32, chose to confine discretionary returns to technical enemies to the exclusive direction, control and authority of the Executive Branch. Both the proponents and opponents of the measure were fully agreed on one point: that it did not allow for judicial review. Moreover, the same Congress which enacted Section 32 did make explicit provision for review in adopting certain other amendments to the Act.

The language of the Section compels the same conclusion. Apart from the fact that the President must determine that return is "in the interest of the United States," it is significant that the Section, throughout its length, is permissive in terms. The Executive "may" return or he "may" return in part; there is no direction that he shall. In deciding whether to do so, he is free to adopt whatever procedures he sees fit. And, most significant of all, if the Executive decides to make a return and publishes notice of intention to do so, he may nonetheless change his mind and revoke his notice, in which event, the statute declares, there shall be "no right of action" to compel a return.

We deal here, in short, with a statute which imposes no legal obligation upon the Government. The provision is an act of grace adopted by Congress in relation to the dispensation of funds over which Congress has plenary control. The potential benefits run to persons who are enemies and who have no rights in the subject matter, constitutional or otherwise. The administration and control of the scheme of dispensation have been entrusted, in all particulars, to the Executive. As said by this Court in relation to another statute, "Congress intended [the Executive] to act for it and to construe the meaning of the words used * * * and to give effect to his interpretation without the intervention of the courts." *Work* v. *Rives*, 267 U.S. 175, 182.

II

Petitioner does not, indeed, contend that the Trading with the Enemy Act provides him a judicial

remedy. He urges, rather, that authority to review the executive decision can (or should) be found in the Administrative Procedure Act, the Declaratory Judgment Act, or in 28 U.S.C. 1331 ("federal question" jurisdiction). If we are correct in our view of the statute and its history (Point I), these contentions must fail.

The Administrative Procedure Act is inapplicable because the subject matter is one committed to agency discretion. There is also a further barrier: the Administrative Procedure Act does not apply where there is another statute which precludes review.

Section 7(c) of the Trading with the Enemy Act explicitly states that the "sole relief and remedy of any person having any claim to any * * * property * * * transferred * * * to the Alien Property Custodian * * * shall be that provided by the terms of this Act * * *." And Section 9, which extends a right of action only to those who are non-enemies, declares that "[e]xcept as herein provided, the * * * property * * * transferred * * * to the Alien Property Custodian, shall not be * * * subject to any order or decree of any court." Congress was aware, when it later enacted Section 32, that provisions of the original Act (which it left unchanged) specifically forbade suits by enemies. Nonetheless, it consciously failed to provide for judicial review of actions taken pursuant to Section 32. There is thus no basis, as the court below has consistently held, for implying an exception to the "sole relief and remedy" language of the Trading with the Enemy Act. Nor is there any constitu-

tional reason for straining to do so. The remedy under Section 9(a) is fully adequate, as this Court has stated, to protect all rights which are within the protection of the Fifth Amendment.

The same considerations apply to petitioner's efforts to find jurisdiction in the Declaratory Judgment Act and in 28 U.S.C. 1331. A declaratory judgment is a form of remedy and it, too, is excluded. Moreover, the Declaratory Judgment Act is not, in and of itself, a grant of jurisdiction; the availabilty of declaratory relief depends upon the existence of a justiciable right.

Similarly, under 28 U.S.C. 1331, the question whether petitioner has a justiciable right arising under the laws of the United States depends upon whether Congress has created one in the Trading with the Enemy Act. There was no compulsion to do so. "When the claims created are against the United States, no remedy through the courts need be provided," *Stark* v. *Wickard*, 321 U.S. 288, 306. As this Court observed in dealing with return provisions of the Trading with the Enemy Act adopted after World War I, there can be no question that Congress was fully entitled to deal with the subject of return to enemies "as a matter of grace," *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 124.

The cases upon which petitioner relies—cases in which the Court has found authority to review agency action in the absence of explicit provision therefor—are cases arising under other statutes or under claim of constitutional right. They are unpersuasive here. What is decisive in the present situation is that the

Executive has acted under an authority vested explicitly in him and that his action has been taken pursuant to a scheme of grace; his denial of petitioner's claim involves no invasion of any protected right, denial of employment opportunities, or infliction of injury to reputation or other interest.

ARGUMENT

I

CONGRESS, IN ENACTING SECTION 32, INTENDED TO GRANT ONLY AN ADMINISTRATIVE AND DISCRETIONARY REMEDY; IT CREATED NO RIGHT OF ACTION

Petitioner in this case is a resident and national of Germany and hence admittedly ineligible (see Pet. Br. 37) to sue for the recovery of vested property under Section 9(a), the Section which provides plenary relief to non-enemies whose property has been erroneously or invalidly seized under the Trading with the Enemy Act.[4] Under the scheme of that Act, property which is not returned is to be covered into a War Claims Fund and used to satisfy the claims of American nationals who suffered injury from the wartime acts of Germany and Japan. Section 39, Appendix A, *infra*, pp. 34–35.[5] Individual

[4] Section 9(a) (Pet. Br. 42) is available to any person "not an enemy or ally of enemy." "Enemy" is defined in Section 2 (Pet. Br. 41) to include any person resident in the territory of an enemy country. See, generally, *Clark* v. *Uebersee-Finanz-Korp.*, 332 U.S. 480. Petitioner's enemy status is unaltered by the termination of hostilities. Joint Resolution of October 19, 1951, 65 Stat. 451. Cf. *Swiss Ins. Co.* v. *Miller*, 267 U.S. 42.

[5] Enemy property is initially subject to the payment of the enemies' creditors. See Section 34, 50 U.S.C. App. 34, relating to so-called debt claims.

enemies whose property has been taken are to look to their own Governments for redress. Germany has solemnly recognized by treaty obligation its duty to compensate the former German owners whose property has been seized by the United States pursuant to the Trading with the Enemy Act.[6]

Petitioner claims, however, that he is entitled, under the provisions of Section 32(a)(2)(D) of the Act, (1) to an administrative determination that he is a person eligible under that Section for the return of vested property and (2) to judicial review of an administrative decision holding him ineligible.

Section 32, as we shall point out, is an act of grace which provides that the Executive, in his discretion, may make returns to certain technical enemies, *i.e.*, persons barred from right of recovery, when he concludes that such a course is "in the interest of the United States." The important point, for present purposes, is that Section 32 created no justiciable rights and that Congress consciously and deliberately withheld judicial remedies thereunder. Indeed, even though the Executive has decided to make a return under Section 32 and has published notice of his intention to do so, he may revoke, in which event such

---

[6] Convention on the Settlement of Matters Arising out of the War and the Occupation (Bonn Convention), May 26, 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris on 23 October 1954), 6 U.S.T. 5652, 5670, T.I.A.S. 3425. See discussion in *Tag* v. *Rogers*, 267 F. 2d 664, 668 (C.A.D.C.).

revocation "shall confer no right of action upon any person to compel the return" (Section 32(f)).

A. *The Legislative History of Section 32:*

The legislative history of Section 32 clearly discloses that the Congress intended, in Section 32, to provide an administrative and discretionary remedy which was not to be subject to any form of judicial review. The origin of the Section is found in H.R. 4840, which was introduced in the House (78th Congress, 2d Session) at the instance of the Attorney General and the Alien Property Custodian. The bill contemplated a complete overhaul of the Trading with the Enemy Act as to returns, payment of debt claims, and administrative matters growing out of World War II vestings. Section 32 of that bill was designed primarily to make possible the return of vested property to so-called technical enemies, who were not eligible to file claims or sue under Section 9(a).[1] Section 32(a), couched in terms similar to those of the present Section 32, provided for the return of property to such persons whenever the Executive was of the opinion that such return "would not be contrary to the interest of the United States." In a joint letter to the Speaker of the House (Hearing before the House Committee on the Judiciary (Subcommittee 1) on H.R. 4840, 78th Cong., 2d Sess., p. 11), the Attorney General and the Custodian stated that the proposed Section 32(a) "provides an administrative method for the return of property in particu-

[1] Among those barred by Section 9 were the residents of countries occupied by the enemy during the war. See *Guessefeldt* v. *McGrath*, 342 U.S. 308, 314–315.

lar cases without judicial proceedings."[8] The session expired before H.R. 4840 was reported out of Committee.

Comparable provisions to those of Section 32(a) of H.R. 4840 were introduced at the next session of Congress as H.R. 3750, which became Section 32 of the Act. The scheme of administrative returns without judicial review was retained. The non-availability of judicial review was clearly expressed at the Hearings on H.R. 3750 by Mr. Markham, the then Alien Property Custodian:

> I want to be sure I make this clear. Supposing a person applies to the Custodian for the return of a property, and for reasons that I deem appropriate under the bill I refuse to return the property. Now, we will say that this person would have to be a technical enemy, a Frenchman. He has no right to compel me to return it under this bill. [Hearings before the House Committee on the Judiciary (Subcommittee 1) on H.R. 3750, 79th Cong., 1st Sess., p. 14.]

A like understanding was expressed by opponents of the bill. Thus Mr. Charles R. Carroll, representing the National Foreign Trade Council, was asked respecting the administrative discretion to return under Section 32: "Is there any judicial review of that very question?" He replied: "On specific

[8] Subsection (b) contained provisions for judicial relief by way of an independent suit for a return comparable to that provided in Section 9(a), or by way of a suit for just compensation. There was no provision for judicial review of the administrative determinations under subsection (a).

returns, no, sir." Hearings before the Senate Subcommittee on the Judiciary on S. 2378 and S. 2039, 79th Cong., 2d Sess., p. 59. See also Hearings before the House Committee on the Judiciary (Subcommittee 1) on H.R. 3750, 79th Cong., 1st Sess., pp. 11, 14, 34, 35, 37, 51, 52. Although the desirability of providing for judicial review was repeatedly urged before both committees of Congress by opponents of the bill, no change was made in the bill in this respect.

This refusal of Congress to provide for judicial review, although its lack had been repeatedly pointed out and discussed, is in sharp contrast to Congress's action in making explicit provision for review in other amendments to the Trading with the Enemy Act adopted at the same session and considered by the same committees. Thus, Section 20 of the Act, amended in the same bill which contained the new Section 32 (Public Law 322, 79th Cong., approved March 8, 1946; 60 Stat. 50), made explicit provision for judicial review of determinations of allowable counsel fees in return proceedings. See House Report No. 1269, 79th Cong., 1st Sess., p. 18; Senate Report No. 920, 79th Cong., 2d Sess., p. 7.

As we have indicated (*supra*, pp. 2–3), Section 32 as enacted on March 8, 1946, provided that the President was *not* authorized to return vested property to a German citizen, such as the petitioner, who was present in Germany at any time between that date and December 7, 1941. The Congress, some five months later, amended the section to grant the Executive authority to make additional returns. This amendment resulted mainly from the representations made by the American Jewish Congress and the American Federation of

Jews from Central Europe that it was unjust to deny a return of their American assets to refugees who had been stripped of their German properties in the course of a persecution directed against their race and their religion. See, Hearings before the House Committee on the Judiciary (Subcommittee 1), on H.R. 5089, 79th Cong., 2d Sess., pp. 81–86; Hearings before a Subcommittee of the Senate Committee on the Judiciary, 79th Cong., 2d Sess., on S. 2378 and S. 2039, pp. 7–8, 10–11, 15–27.

S. 2039 (the "Mead bill") proposed to amend subsection (D) of Section 32(a)(2) by exempting from the prohibition on returns "a person who was a victim of religious or racial persecution in the country of his origin or residence." Objection was made to the proposed amendment on the ground that its language was so broad as to make administration difficult. It was pointed out that there were no limiting dates and that it might be construed to cover instances of individual vengeance as well as persecution by governmental action or action under color of law. See Senate Hearings on S. 2378 and S. 2039 (*supra*), pp. 9–10. As a result, the Senate accepted a compromise which had been recommended by the House Committee and which was set out in S. 2378. This compromise now appears as the first proviso of Section 32(a)(2)(D); it broadens the authority of the Executive[9] to include returns to persons "who, as a consequence of any law, decree,

[9] By Executive Order No. 9725, May 16, 1946 (11 F.R. 5381) the President delegated to the Alien Property Custodian the administration of Section 32. By Executive Order No. 9788, October 14, 1946, the functions of the Custodian were transferred to the Attorney General (11 F.R. 11981).

or regulation of the nation of which he was then a citizen or subject, discriminating against political,[10] racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation." [11]

The amendment was approved on August 8, 1946, as part of Public Law 671, 79th Cong., 60 Stat. 925. As part of the same bill, Congress added to the Act Section 33, a statute of limitations, and Section 34, which provided for administrative determinations of debt claims allowable out of the vested property. Section 34 made explicit provision for hearings on such claims and for judicial review of the determinations.

In connection with the addition to the Act of Section 33, Congressmen Sumners and Michener, the Chairman and the ranking member of the House Judiciary Committee, respectively, inserted in the record, with approval, a letter from the Custodian stating his understanding as to an amendment of that section that "this amendment is not to be regarded as imply-

[10] We have found no legislative history indicating what was intended by the term "political group." The only reference to the term is in House Report No. 2398, 79th Cong., 2d Sess., p. 19, and is to the effect that it was not contemplated that returns could be made to "members of groups or factions, such as the Iron Guard in Rumania, which were at one time proscribed and later restored to favor by Axis influence."

[11] The hearings and reports indicated that "full rights of citizenship" meant "the degree of civil rights which are normally enjoyed." Hearings before the Senate Subcommittee of the Committee on the Judiciary, 79th Cong., 2d Sess., on S. 2378 and S. 2039, p. 33; House Report No. 2398, 79th Cong., 2d Sess., pp. 18–19.

ing that there is judicial review under Section 32." 92 Cong. Rec. 10485–10486. And the committee reports expressly pointed out that judicial review was made available in respect of administrative determinations of debt claims under Section 34. House Report No. 1209, 79th Cong., 1st Sess., p. 7; House Report No. 2398, 79th Cong., 2d Sess., p. 13; Senate Report No. 920, 79th Cong., 2d Sess., p. 7; Senate Report No. 1839, 79th Cong., 2d Sess., pp. 7–8. The failure to make any provision for judicial review of determinations under Section 32, although the issue had been repeatedly raised, can be regarded only as clear proof that Congress intended Section 32, as originally enacted and as amended in August of 1946, to afford only a discretionary and administrative remedy, without right of resort to the courts.[12]

Petitioner's references to legislative history (Brief, pp. 18–21) include general statements of witnesses at hearings to the effect that Congress intended in Sections 32 and in 32(a)(2)(D) to "release" vested property to persecuted nationals of Germany and of statements in congressional reports as late as 1949, 1950, and 1951 describing, in the words of later com-

[12] Further confirmation of this intention is found in the contrast between the return legislation enacted after World War I with the provisions of Section 32. After World War I Congress broadened the return provisions of the Act to allow certain foreign enemies to recover seized property, but at that time Congress created an explicit right in the enemies to sue. See Sections 9(b) and 9(c). Those World War I provisions have been held not to apply to World War II vestings. *Feyerabend* v. *McGrath*, 189 F. 2d 694 (C.A. D.C.). Cf. *Markham* v. *Cabell*, 326 U.S. 404.

mittees, the provisions and effect of Section 32 as those committees understood them."[13]

Statements made in congressional reports subsequent to the enactment of a statute have little significance as aids to interpretation in comparison with expressions of contemporaneous intent. *Rainwater v. United States*, 356 U.S. 590, 593; *Fogarty v. United States*, 340 U.S. 8, 13–14. The important thing is the meaning Congress intended to express in 1946. And it does not follow from broad statements of intention to relieve "victims of Axis oppression", or from statements that "enemy citizens who had been persecuted for political, racial or religious reasons could have their former property returned to them," (Pet. Br. 19–22) that Congress intended to authorize the return of vested property to every former owner who has been persecuted in any way or in any degree. Had that been the intention of Congress it would have enacted the "Mead bill" (S. 2039) which provided relief in general terms for any "person who was a

[13] Respectively, Senate Report No. 784, 81st Cong., 1st Sess. (1949); House Report No. 2338, 81st Cong., 2d Sess. (1950); Senate Report No. 600, 82d Cong., 1st Sess. (1951). These reports dealt with proposed legislation which was eventually enacted in 1954 (68 Stat. 767) authorizing the President to designate "successor organizations" to which returns could be made of property the former owner of which was deceased and who left no surviving successors in interest eligible for return. Property so returned was to be used for the rehabilitation of victims of persecution. See Section 32(h) of the Act.

Petitioner does not allude to the fact that proposals to make determinations under Section 32 judicially reviewable were offered in subsequent Congresses, but failed of enactment, S. 2544, 82d Cong., 2d Sess.; S. 34, 83d Cong., 1st Sess.

victim of religious or racial persecution" (see *supra*, p. 15)."

B. *The Statutory Terms:*

In all of its pertinent provisions, Section 32 is permissive, not mandatory. Thus, it does not require that the President or his delegate return any property at all; the language is that he "may" return. More than that, he "may" make a return only if he concludes that to do so is "in the interest of the United States." He is also authorized by the language of the Section to make only a partial or a limited return. Section 32(d) (Appendix A, *infra*, pp. 33–34). Should he decide that all the conditions are satisfied and direct a return, he may nonetheless change his mind and revoke his published notice of intention to return—in which event, there shall be *"no right of action"* to compel a return (Section 32(f) (Appendix A, *infra*, p. 34).

Not only is the discretion as to the making of returns broad; that as to procedure is equally so. Section 32 does not prescribe any procedure, and it does not require a "hearing." Section 35 of the Act *authorizes* such hearings "as may be deemed necessary," but the hearings held under Section 32 are not "required by statute" (see, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49–50), and, in practice, the

[11] The detailed wording of the "persecution" provisions of Sections 32(a)(2)(C) and 32(a)(2)(D), as added August 8, 1946, is, of course, a far cry from the broad return authorization which petitioner suggests.

majority of claims, whether allowed or denied, are disposed of summarily under the Regulations.[15]

Nothing in the language of Section 32 justifies petitioner's conclusion (Br. 22) that there are two "stages" in the administrative process: first, a proceeding to determine eligibility; second, a decision whether return is in the interest of the United States. And, in practice, the Director has not infrequently disallowed a claim on grounds of "national interest" without deciding eligibility at all.[16]

On the face of the statute, and in the light of the legislative history, Section 32 is an example of the type of statute where Congress, recognizing an obligation, *though not a legal one,* has confided the entire administration of the statute to the Executive Branch. Congress, we submit, "intended [the Executive] to

---

[15] In the exercise of his discretion the Custodian has returned property to nationals of countries like France, Italy, and other allied nations without a hearing upon certification by the government concerned that the claimant did not collaborate with the enemy during the war. See *Annual Reports of the Office of Alien Property* for the fiscal years 1946 (p. 149), 1947 (p. 84), 1948 (pp. 7, 86–87), 1949 (pp. 5, 74), 1950 (p. 69).

In 1955, the Attorney General determined, in agreement with the Chairman of the Civil Service Commission, that the hearing and decision of claims under Section 32 would be conducted in accordance with the requirements of the Administrative Procedure Act (see Pet. Br. 16). Section 34 (debt claims) of the Trading with the Enemy Act has always been construed to require hearings and to be subject to the Administrative Procedure Act, so the hearing officers handling Section 34 claims had to be appointed and qualified under 5 U.S.C. 1010. Since the same examiners also consider Section 32 claims, it made for simplicity of procedure to follow the hearing requirements of the Administrative Procedure Act on both types of claims.

[16] Also, on occasion, claims are disallowed without deciding eligibility because the claimant has not established pre-vesting ownership.

act for it and to construe the meaning of the words used * * * and to give effect to his interpretation without the intervention of the courts." *Work* v. *Rives*, 267 U.S. 175, 182. Cf. *Switchmen's Union* v. *Board*, 320 U.S. 297, 300, 301; *Estep* v. *United States*, 327 U.S. 114, 120.

II

THE DISTRICT COURT DID NOT HAVE JURISDICTION UNDER THE ADMINISTRATIVE PROCEDURE ACT, THE DECLARATORY JUDGMENT ACT OR OTHER PROVISION OF LAW

A. Asserting that the Government, by moving to dismiss, has admitted allegations that the Director's decision was illegal and arbitrary (Pet. Br. 10), petitioner argues that the legal wrong is one which may be redressed under the Administrative Procedure Act.

Before turning to the claim that the Administrative Procedure Act confers jurisdiction to review, we note our disagreement with the suggestion that the Government has conceded that the administrative decision is an arbitrary one. Petitioner's complaint alleges the specific facts concerning petitioner's deprivation of rights in Germany and the grounds upon which the Director has acted (R. 6). These allegations are amplified and explained by the administrative decision. When a complaint, in addition to general and conclusory allegations, sets out the specific acts upon which the conclusions or characterizations are based, a motion to dismiss admits only the former.[17] The specific allegations control and qualify the general

[17] See *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 401; *Straus* v. *Foxworth*, 231 U.S. 162, 168; *Pierce Oil Co.* v. *City of Hope*, 248 U.S. 498, 500.

ones.[18] Reading the complaint as a whole, it is apparent that petitioner's claim of arbitrariness means only that the Director did not accept the legal interpretation of Section 32(a)(2)(D) for which petitioner contends. The Director's decision, read against the language and background of the Section, is, in our view, a reasoned and a reasonable one. Although we do not brief the merits of the Director's holding inasmuch as the decision below turns solely on the issue of jurisdiction to review, we dispute any suggestion that it is evident or established that the Director has proceeded arbitrarily or in defiance of law.

Petitioner's argument that there is a "presumptive" remedy under the Administrative Procedure Act encounters two obstacles. Section 10 of the Administrative Procedure Act (Pet. Br. 46), dealing with judicial relief of agency action, begins with two exceptions: "*Except* so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *." This case falls within both.

As we have argued above (Point I), Section 32 is in terms discretionary and the legislative history conclusively shows that this result was fully intended.

Moreover, the Trading with the Enemy Act precludes review except insofar as review is authorized by that Act. Section 7(c) of the statute (Pet. Br. 42) unambiguously states:

> The sole relief and remedy of any person having any claim to any * * * property * * *

[18] See *Newport News Co.* v. *Schauffler*, 303 U.S. 54, 57; *Nortz* v. *United States*, 294 U.S. 317, 324.

> transferred * * * to the Alien Property Custodian * * * shall be that provided by the terms of this Act * * *.

And Section 9(f) declares:

> Except as herein provided,[19] the * * * property * * * transferred * * * to the Alien Property Custodian, shall not be * * * subject to any order or decree of any court.

Reading these two sections of the original Act with Section 32, the result is plain. Non-enemies have a right to sue for recovery in the District Courts;[20] enemies can obtain returns, if at all, only as a matter of executive grace.[21]

There is no basis for petitioner's suggestion that Section 7(c) should be construed only to limit the remedies available to non-enemies. As this Court has said, the language is "all-inclusive," *Becker Co.* v. *Cummings*, 296 U.S. 74, 79. And it cannot be supposed that Congress was unaware, when it provided

---

[19] This refers to Section 9(a), suits by non-enemy claimants for return. Section 9 when originally enacted in 1917 was not divided into subsections, and what is now 9(a) was the first sentence of the section, and what is now 9(f) was the next to the last sentence.

[20] Section 9(a) provides for a trial *de novo*, not for judicial review of the administrative denial of a claim. *Stoehr* v. *Wallace*, 255 U.S. 239, 245–246. The claimant may file suit "forthwith" after filing his notice of claim (*Central Trust Co.* v. *Garvan*, 254 U.S. 559, 567), or "as promptly after the seizure as he chooses" (*Stoehr* v. *Wallace*, *supra*, at 243, 246), and he is not required to exhaust his administrative remedy. *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215 (S.D.N.Y.); *Duisberg* v. *Crowley*, 54 F. Supp. 365 (D.N.J.).

[21] Cases like *Homovich* v. *Chapman*, 191 F. 2d 761 (C.A. D.C.), cited by petitioner (pp. 23–24), are distinguishable. Under numerous statutes, the agency has *some* discretion, but the matter is not *committed*.

administrative relief for certain technical enemies in 1946, that the Act in terms forbade institution of suit by enemies. As emphasized earlier, both the proponents and the opponents of Section 32 repeatedly pointed out that the new section made no provision for judicial proceedings and that judicial remedies were available only to non-enemies.[22]

This view has been repeatedly expressed in a series of unanimous decisions by the court below. In *McGrath* v. *Zander*, 177 F. 2d 649 (C.A. D.C.), Judge Proctor observed (p. 651) that relief under the Administrative Procedure Act was precluded by the "discretionary nature of the action granted the Custodian" and by the "sole relief and remedy" provision of Section 7(c). In *Hawley* v. *Brownell*, 215 F. 2d 36 (C.A.D.C.), Judge Prettyman repeated (p. 37) the proposition that "Section 32 is discretionary and that judicial review of denial of a claim under Section 32 is precluded by the provisions of Section 7(c) of the Act." In *Tiedemann* v. *Brownell*, 222 F. 2d 802 (C.A.

[22] Petitioner argues (Pet. Br. 25–26) that Section 32(a)(2)(D) is legislation "subsequent" to the Administrative Procedure Act (the amendment to the former was approved August 8, 1946, and the latter on June 11, 1946), and so on the authority of Section 12 of the Administrative Procedure Act there must be judicial review unless "expressly" precluded. Petitioner ignores the fact that Section 12 (5 U.S.C. 1011), enacted in June 1946, provides that: "This Act shall take effect three months after its approval," and also provides that "Nothing in this Act shall be held * * * to limit or repeal additional requirements imposed by statute or otherwise recognized by law" (such as the provisions of Section 7(c) and the requirement of Section 9(a) that suit may be brought only by a "person not an enemy"). See *Securities and Exchange Commission* v. *Morgan, Lewis, & Bockius*, 209 F. 2d 44, 49 (C.A. 3); *Gostoffich* v. *Valore*, 257 F. 2d 144, 145 (C.A. 3).

D.C.), Judge Fahy stated (p. 804) that since "jurisdiction is not found * * * in the Act * * * we may not search elsewhere for it, for Section 7(c) of the Act excludes any other remedy to a person having any claim to money or other property paid over to the Alien Property Custodian or seized by him." In *Legerlotz* v. *Rogers*, 266 F. 2d 457 (C.A.D.C.), Judge Washington declared (p. 459): "Nor does this court have jurisdiction under Section 32(a) to grant relief, either in a suit in equity or by judicial review of the Section 32 administrative proceedings, because by virtue of Section 7(c) the exclusive judicial remedy under the Act is to be sought under Section 9(a)."[23]

We emphasize, finally, that, in the context of the Trading with the Enemy Act, there can be no occasion for straining to imply a right of action. The remedy in Section 9(a) is fully adequate to protect all rights which are within the protection of the Fifth Amendment. *Stoehr* v. *Wallace*, 255 U.S. 239, 246; *Becker Co.* v. *Cummings*, 296 U.S. 74, 79; *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 484. Enemy claimants, as defined in the Trading with the Enemy Act, are not within the due process or just compensation clauses. *United States* v. *Chemical Foundation*, 272 U.S. 1, 11; *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120–121. And see *Miller* v. *United States*, 11

[23] Although Section 32 was involved in the *Legerlotz* case, the main point of the decision was that the *allowance* of a claim under Section 32, and a subsequent amendment of a return order under that Section, did not toll the period of limitations provided for suits under Section 9(a). A petition for a writ of certiorari was granted in *Legerlotz*, 361 U.S. 808. An administrative settlement has been reached, however, and the parties are stipulating for dismissal of the writ.

Wall. 268, 305–306. "An enemy or an ally of enemy is positively and intentionally denied relief, not only in 9(a) but elsewhere, because his property can be forfeited." *Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 797 (C.A. 2), affirmed, *sub nom. Silesian-American Corporation* v. *Clark*, 332 U.S. 469, 475.[24]

B. What has been said above—our arguments as to the discretionary character of relief under Section 32 and as to the exclusiveness of the remedies provided within the framework of the Trading with the Enemy Act—is likewise responsive to petitioner's efforts to find jurisdiction in the Declaratory Judgment Act and in 28 U.S.C. 1331 ("federal question" jurisdiction of the District Courts).

A declaratory judgment is a form of remedy, and the prohibitions of the Trading with the Enemy Act against suit by enemies and against non-statutory remedies (Sections 7(c) and 9(f)) apply to that form of remedy no less than to others. Moreover, the Declaratory Judgment Act is not, in and of itself, a grant

[24] In an early and leading case under the Trading with the Enemy Act, Judge Learned Hand pointed out that enemy claimants were "expressly forbidden by valid enactment from bringing any suit in any court," and that the Act provided "no remedies whatever, except under Section 9." *Kahn* v. *Garcan*, 263 Fed. 909, 913, 915 (S.D.N.Y.). For other expressions of the same view in the lower federal courts, see *Kuttroff* v. *Sutherland*, 66 F. 2d 500 (C.A. 2); *Becker Steel Co. of America* v. *Cummings*, 95 F. 2d 319, 320 (C.A. 2), certiorari denied, 305 U.S. 604; *Berger* v. *Ruoff*, 195 F. 2d 775 (C.A. D.C.), certiorari denied, 343 U.S. 950; *Pflueger* v. *United States*, 121 F. 2d 732 (C.A.D.C.), certiorari denied, 314 U.S. 617; *United States* v. *Sutherland*, 51 F. 2d 607 (C.A. D.C.), certiorari denied, 284 U.S. 667; *Koehler* v. *Clark*, 170 F. 2d 779, 780 (C.A. 9); *Fujino* v. *Clark*, 172 F. 2d 384 (C.A. 9), certiorari denied, 337 U.S. 937.

of jurisdiction, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671; the availability of declaratory relief depends upon the existence of a justiciable right. One is thus thrown back to the question (Point I) whether Congress, by enacting Section 32, created such a right. Certainly, it was under no compulsion to do so. "When the claims created are against the United States, no remedy through the courts need be provided," *Stark* v. *Wickard*, 321 U.S. 288, 306. "All constitutional questions aside"—and none are present here—"it is for Congress to determine how the rights which it creates shall be enforced," *Switchmen's Union* v. *Board*, 320 U.S. 297, 301. And an intention to restrict a claimant's remedies to executive relief is not difficult to find "when the Congress is dealing with its own money," *id.*, p. 320 (dissenting opinion of Mr. Justice Reed).

Petitioner relies heavily upon a sentence in this Court's opinion in a deportation case, *McGrath* v. *Kristensen*, 340 U.S. 162, 169: "Where an official's authority to act depends upon the status of the person affected, in this case eligibility for citizenship, that status, when in dispute may be determined by a declaratory judgment proceeding." We question whether petitioner's claim to be considered "eligible" under Section 32 raises an issue of "status." Petitioner's "status" is admittedly that of an "enemy." *Ex parte Kawato*, 317 U.S. 69, 71. The right to sue has been held not to amount to a "status" (*Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.*, 215 F. 2d 300, 305 (C.A. 3), certiorari denied, 356 U.S. 957), and the same would seem to be true of a claim to relief under an isolated statutory provision.

In all events, we believe it plain that the Court in *Kristensen* did not announce a rule that the Declaratory Judgment Act overcomes provisions like Section 7(c) of the Trading with the Enemy Act, which expressly limits judicial relief to that "provided by the terms of this Act." Taken in context, the quoted sentence from the *Kristensen* opinion means simply this: Where the courts have jurisdiction under the Constitution or under a statute as judicially construed, to review administrative decisions, and those decisions depend upon "status," the question may be litigated in a suit for declaratory judgment.

Little need be added in relation to the original jurisdiction of District Courts under 28 U.S.C. 1331. Whether petitioner has a justiciable claim arising under the laws of the United States depends once again upon whether Congress, in providing by Section 32 for dispensation of monies over which it had control, purported to give a judicial remedy or whether it proposed to confine its scheme of dispensation to executive authority and discretion. As this Court stated in dealing with return provisions of the Trading with the Enemy Act adopted after World War I, there can be no question that Congress was fully entitled to deal with the subject "as a matter of grace." *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 124.

Petitioner deals with a variety of cases in which the courts have undertaken to review agency action in circumstances in which the availability of a judicial remedy was debatable. He places particular reliance upon this Court's decisions in *Leedom* v. *Kyne*, 358

U.S. 184, *Harmon* v. *Brucker*, 355 U.S. 579, *Perkins* v. *Elg*, 307 U.S. 325, and *McGrath* v. *Kristensen*, 340 U.S. 162.

We doubt that these cases are helpful in dealing with the ultimate problem which lies at the root of this case: the ascertainment of Congressional purpose as reflected in particular and detailed provisions of the Trading with the Enemy Act. "Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied." *Switchmen's Union* v. *Board*, 320 U.S. 297, 301. The hazard of generalization is all the greater when one considers that each of the cases upon which petitioner relies raised a problem of a very different order from the one presented here.

Leedom v. *Kyne*, *supra*, involved the protected rights of certain employees adversely affected by a Labor Board order which, the Court concluded, had been entered in contravention of a "specific prohibition in the [National Labor Relations] Act" (358 U.S. at 188). There was accordingly no issue of Board discretion. The suit, moreover, was one concededly within the jurisdictional provisions of 28 U.S.C. 1337 "unless the review provisions of the National Labor Relations Act destroyed it" (*id.*, p. 187). Upon the basis of its examination of these review provisions, the Court concluded that the remedy had not been obliterated by statute.

Harmon v. *Brucker, supra,* also involved a protected right—the right to be secure in one's reputation. It did not involve, as the Court viewed the case, judicial review of an act of "administrative discretion" (355 U.S. at 582), but, rather, the question whether the Secretary of the Army had any statutory authority to predicate a military discharge upon factors other than military service. The Court concluded that the case fell under a traditional head of jurisdiction—jurisdiction to determine whether action affecting individual rights taken by an official subject to the District Court's jurisdiction is in excess of that official's statutory powers.[25]

Perkins v. *Elg, supra,* was a case in which the Court held that the complainant was entitled to a determination that she was an American citizen and to an injunction against the continued prosecution of deportation proceedings. The Court also held that the declaratory relief granted would preclude the Secretary of State from denying a passport to Miss Elg on the sole ground that she had lost her American citizenship. Miss Elg, as a citizen, was, of course, within the protection of the Fifth Amendment. Persons in that

[25] In the instant case, of course, there is no question of the Director's scope of authority. The question which the petitioner would have the District Court determine is the merits of the Director's decision in his case. If petitioner's position were accepted, it would apparently mean that a very large number of the Director's decisions might be challenged in the courts. Some hundreds of claims have been denied on the basis of the administrative interpretation of the "persecution" provisions of Sections 32(a)(2)(C) and 32(a)(2)(D). Between the enactment of Section 32 in 1946 and the end of fiscal year 1957, approximately 12,000 claims for the return of property were disposed of, the great majority under Section 32. See *Annual Report to the Office of Alien Property* (1957), p. 54.

category, the Court had long held, could challenge in the courts—at least upon habeas corpus—the lawfulness of an attempted deportation. See *Chin Yow* v. *United States*, 208 U.S. 8, 13; *Ng Fung Ho* v. *White*, 259 U.S. 276, 284. Obviously, the "right" asserted in the instant case is not to be equated with the constitutional right of a citizen to challenge the deprivation of liberty threatened by an impending and unauthorized deportation.

McGrath v. *Kristensen, supra,* involved application of the principle of *Perkins* v. *Elg* (see 340 U.S. at 169–170) to a resident alien (Kristensen) who claimed that the Attorney General had erroneously determined that he was ineligible for American citizenship (a determination of ineligibility which precluded Kristensen from securing executive relief from an order of deportation). As in the *Elg* case, the party seeking judicial relief was one who came within the protection of the Fifth Amendment.

The petitioner in the instant case has enemy status. As an enemy, he has no constitutional right to a return of vested property and he is concededly barred by statute (Section 9 of the Trading with the Enemy Act) from bringing an original District Court proceeding to compel return. His sole claim is that the Executive, in exercising the discretionary authority conferred by Section 32, has made an erroneous decision. If, however, as we contend and as the court below has consistently held, Section 32 constitutes a scheme of discretionary relief or of grace which Congress has confided solely and completely to executive administration and control, there is no jurisdictional

basis upon which petitioner's suit for review of agency action may be entertained. A holding that such was the congressional purpose—a holding which we believe fully warranted by the statutory language and history—would require an affirmance and it would involve no conflict whatever with any decision of this Court.

CONCLUSION

The decision below is correct and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
DALLAS S. TOWNSEND,
ROBERT KRAMER,
Assistant Attorneys General.
IRVING JAFFE,
GEORGE B. SEARLS,
VICTOR R. TAYLOR,
Attorneys.

FEBRUARY 1960.

APPENDIX A

Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App. 1 et seq.:

Section 9(f): Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

* * * * *

Section 32(d): Except as otherwise provided herein, and except to the extent that the President or such officer or agency as he may designate may otherwise determine, any person to whom return is made hereunder shall have all rights, privileges, and obligations in respect to the property or interest returned or the proceeds of which are returned which would have existed if the property or interest had not vested in the Alien Property Custodian, but no cause of action shall accrue to such person in respect of any deduction or retention of any part of the property or interest or proceeds by the Alien Property Custodian for the purpose of paying taxes, costs, or expenses, in connection with such property or interest or proceeds: *Provided*, That except as provided in subsections (b) and (c) of this section no person to whom a return is made pursuant to this section, nor the successor in interest of such person, shall acquire or have any claim or right of action against the United States or any department, establishment, or agency thereof, or corporation owned thereby, or against any person authorized or licensed by the United States,

founded upon the retention, sale, or other disposition, or use, during the period it was vested in the Alien Property Custodian, of the returned property, interest, or proceeds. * * *

* * * * *

Section 32(f): At least thirty days before making any return to any person other than a resident of the United States or a corporation organized under the laws of the United States, or any State, Territory, or possession thereof, or the District of Columbia, the President or such officer or agency as he may designate shall publish in the Federal Register a notice of intention to make such return, specifying therein the person to whom return is to be made and the place where the property or interest or proceeds to be returned are located. Publication of a notice of intention to return shall confer no right of action upon any person to compel the return of any such property or interest or proceeds, and such notice of intention to return may be revoked by appropriate notice in the Federal Register. * * *

* * * * *

Section 39:

(a) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946.

(b) The Attorney General is authorized and directed, immediately upon the enactment of this subsection, to cover into the Treasury of the United States, for deposit into the War Claims Fund, from property vested in or transferred to him under this Act, such sums, not to exceed $75,000,000 in the aggregate, as may be necessary to satisfy unpaid awards heretofore or hereafter made under the War Claims Act of 1948. There is authorized to be appropriated to the Attorney General such sums as may be necessary to replace the sums deposited by him pursuant to the foregoing sentence.

(c) The Attorney General is authorized and directed, immediately upon the enactment of this subsection, to cover into the Treasury of the United States, for deposit into the War Claims Fund, from property vested in or transferred to him under this Act, such sums, not to exceed $3,750,000 in the aggregate, as may be necessary to satisfy unpaid awards heretofore or hereafter made under the War Claims Act of 1948, as amended. There is authorized to be appropriated to the Attorney General such sums as may be necessary to replace the sums deposited by him pursuant to this subsection.

* * * * *

Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1001 et seq.:

* * * * *

Section 12 (*5 U.S.C. 1011*): Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all au-

thority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

* * * * *

APPENDIX B

1. Recommended Decision of Harry R. Hinkes, Hearing Examiner

This is a proceeding for the return of vested property arising out of a claim filed pursuant to the Trading With the Enemy Act, as amended (50 U.S.C. Appx. 1–40) and conducted in accordance with the Rules of Procedure for Claims (8 CFR Part 502).

By Vesting Order No. 97, effective August 17, 1942, there were vested 82 shares of G. Bruning Tobacco Extract Co., Inc., as property of the estate of Mrs. G. Schilling, deceased, Bremen, Germany. By Vesting Order No. 10203, effective December 8, 1947, an obligation of one A. DeWitt Alexander and 570 shares of Pacific Lighting Corporation and accrued dividends were vested as property of Walter Schilling, claimant herein. By Vesting Order No. 12172, effective October 20, 1948, there was vested a certain debt of the Lynchburg Trust & Savings Bank, Lynchburg, Virginia, as property of the representatives and heirs of Mrs. G. Schilling, deceased. The vested property has been liquidated and the sum of over $68,000 represents claimant's share of the accounts. The claim is therefore an excepted claim within the meaning of section 502.2(h) of the Rules.

Pursuant to notice a hearing was held before me at which Richard P. Lott, Esq., represented the Chief of the Claims Section. Henry I. Fillman, Esq., of Katz & Sommerich, New York City, appeared for claimant. The only oral testimony was that of an attorney, M. Magdalena Schoch, an employee of this

Office, called as a witness by the claimant with respect to her personal knowledge of conditions in Germany. The rest of the record is documentary. Briefs were filed by both parties.

PROPOSED FINDINGS OF FACT

1. Claimant, Walter Schilling, was born in Bremen, Germany, in 1910 and has always been a citizen and resident of Germany.

2. Claimant was the owner of the claimed property immediately prior to its vesting.

3. Claimant has never been a member of the Nazi Party or of any of its affiliates. On the contrary, he was an opponent of Nazism and known as such.

4. The Weimar Constitution of 1919 declared the equality of all citizens and made all German citizens eligible for public office in Germany "without distinction." These civil servants were "servants of the whole community, not of a party."

5. Under the Nazis, various laws were promulgated destroying the political freedom of public officials such as judges and making their appointment conditional upon their complete support of Nazism. This support could be expressed obviously by membership in the Party or in one of its affiliates. Political reliability was substituted for technical competence as the standard for civil service. Similar political tests were applied by government examiners to applicants seeking admission to the bar.

6. Only one political party was recognized by the German government under the Nazis, the Nazi Party. The reconstruction of dissolved, or the formation of new, political parties and even attempts at such activities were treated as treason. The Nazi administration regarded all who were not Nazis as ineligible for public office and the practice of law.

7. Claimant received a law degree from the University of Munich in 1934 and thereafter served as a Referendar (apprentice) in the courts of Bremen until 1939 when he became eligible to take his final examinations for admission to the legal profession.

8. Claimant knew that Nazi allegiance was a prerequisite for admission to the legal profession. Nevertheless he refused to support the Nazi movement, and rejected an invitation to become a member of the Nazi Party. As a consequence, he was not considered politically reliable.

9. Claimant took his final examinations in 1939 before the Chairman of the Examining Board, a prominent Nazi who would not pass any non-Nazi applicant. Claimant failed to pass. Claimant was informed by this chairman that claimant would find no position if claimant did not cooperate with the Nazis, because claimant had placed himself outside the community of the German people. Claimant, nevertheless, refused to change his position.

10. Claimant took a second entrance examination in 1940 before another Board Chairman and passed, but was told he could not hope for a career without party membership.

11. Claimant, knowing that he would not be licensed to practice law or be accepted for public service without party membership, obtained a job as a legal assistant or clerk in a Bremen law firm. In 1942 he went to work for a German industrial firm in a legal capacity where he continued until the end of the hostilities. Claimant then, for the first time, applied for admittance to the bar and was admitted to practice in Bremen as a lawyer.

PROPOSED CONCLUSIONS

The only issue in this proceeding is claimant's eligibility for a return of the claimed property under section 32 of the Act. Claimant, being a German citizen present in Germany throughout the war, must show that he failed to enjoy full rights of citizenship throughout the period of hostilities as a result of German laws discriminating against political, racial or religious groups. *In the Matter of Kashiro Maeda,* Title Claim No. 45628, Docket No. 1343, February 3, 1954.

In substance this claim proceeds upon the argument that claimant was denied admission to the practice of law, which was a substantial deprivation of his rights as a citizen; that this denial was due to his being non-Nazi (or anti-Nazi); that non-Nazis (or anti-Nazis) were recognized and treated as a political group by the Nazi authorities and under Nazi laws.

It is conceded by the Claims Section that Walter Schilling was not a member of the Party or any of its affiliates and that this status precluded his admission to the Bremen bar. It is argued, however, that the denial of this profession's practice was not a deprivation of a right of citizenship, but merely a denial of a privilege accorded members of the Nazi Party and, therefore, not a basis for a finding of eligibility under § 32(a)(2)(D). Cf. *In the Matter of Hermann Winter,* Title Claim No. 45960, Docket No. 56 T 37, decision of the Hearing Examiner dated May 24, 1956, adopted July 25, 1956. In that case, I held that a schoolteacher's dismissal for his non-membership in the Nazi Party was not a denial of a "right due generally qualified individuals" but merely a loss of privileges extended only to Party members and followers. In the instant claim, however, unlike the

Winter claim, the record makes it clear that, before the Nazis came into power, claimant had a *constitutional right* to be eligible for public office as a judge or licensed for the private practice of law regardless of political belief. The practice of law was no mere privilege. The Supreme Court of this country has ruled that the practice of law is not a matter of the State's grace; a person cannot be prevented from practicing except for valid reasons. *Schware* v. *Board of Bar Examiners of the State of New Mexico,* 25 Law Week 4276 (1957). The purport of Articles 109, 118, 128, 129, *et al.* of the German Weimar Constitution is certainly similar. The Nazis destroyed that right as well as the right to be eligible for public office which was also made dependent upon the applicant's politics. This change in rights was a substantial loss to the German citizen. It is futile to argue that the Nazis created this condition by the enactment of a law. That law, by its destruction of political freedom and by its discrimination against nonconforming political beliefs is entitled to no more credit and support from us than are the notorious Nazi confiscatory decrees which discriminated against the German Jew, which decrees German courts have repudiated as "in contradiction with natural law," "immoral," "contrary to the fundamental principles of any lawful-state order." See *1 Sueddeutsche Juristen Zeitung col. 36* (1946); *2 Sueddeutsche Juristen Zeitung col. 257, 262* (1947); *8 Neue Juristische Wochenschrift 905* (1955) and discussion by Domke, *American-German Private International Law,* page 51 *et seq.* I cannot give Nazi legalism a morality and dignity which our courts usually accord the acts of another government. Any Nazi attempt, albeit by semblance of legislation, to diminish a constitutional right for invalid, discriminatory reasons should not

be upheld. See No. 296, 20 *Dept. State Bull.* 592 (1949); *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (1954).

It is not sufficient, however, that claimant failed to enjoy full rights of citizenship pursuant to German law; to recover, claimant must show that the deprivation was pursuant to a law which discriminated against political, racial or religious groups. The totalitarian laws which impaired or destroyed the German constitutional rights were universal in scope. If the civil rights lost under the Nazis were to be regarded as the sole basis for eligibility residence in Nazi Germany would automatically qualify one for return. Cf. *Matter of Maeda, supra.* Congress intended but a cautious and limited program of returns for certain German *minorities.* See House Hearings on H.R. 5089, 79th Cong., 2d Sess. p. 81. A claimant's denial of civil rights, *discriminatorily,* was made the test and measure of eligibility.

To meet this issue, claimant argues that he and the others who *refused to support* the Nazi Party, unlike the bulk of the German population, were barred from private practice and public office. They were not just non-members of the Party. Such description would include perhaps 90% of the German population, since Party membership was limited to about one-tenth of the population. Department of State, *National Socialism,* page 45 (1943). This claim does not require a conclusion that mere non-members be deemed a persecuted political group. It suggests, however, that those who were expected and invited to be Nazi Party members but who refused to join be considered a political group. The membership of such a group was necessarily a very small minority of the population. The Nazis considered them "politically unreliable"

and regarded them as having segregated themselves from the rest of the community. The Nazis punished them as a group by disqualifying them from the legal profession. Unlike the loss of religious freedom which was experienced by all Germans, this deprivation was imposed upon a small minority of Germans, i.e., those who refused to support Nazism. Cf. *Matter of Hannah von Bredow,* Title Claim No. 42152, Docket No. 54 T 70, decision of the Hearing Examiner dated February 28, 1956. Claimant cites Mr. Peyton Ford, then Assistant to the Attorney General, who said in 1948, that the

> * * * groups who will benefit from the proposed amendment are the very groups who were regarded as enemies by the countries against which this country went to war * * *. In the imposition of persecution, they were treated as groups. (Sen. Rep. No. 784 on S. 2764, Appendix H, p. 12).

Claimant argues, therefore, that the Office should also treat them as a group. In this respect, claimant's position is not in disagreement with the definition of "group" in Webster's New International Dictionary, 2d Edition (1944):

> An assemblage of persons or things regarded as a unit because of their comparative segregation from others."

Since the group described by claimant was persecuted for its political behavior, claimant contends that this Office must regard it as a political group.

Claimant continues by suggesting a more liberal reading of § 32. He cites the testimony of the Deputy Director of this Office that

> * * * Under [section 32] * * * enemy citizens who had been persecuted for political, racial or religious *reasons* could have their

> former property returned to them. (Hearings, Administration of the Trading with the Enemy Act, 83rd Cong., 1st Sess., p. 104.) [Emphasis added.]

This language is repeated in the Final Report of the Subcommittee, page 6. Claimant points to the indisputable fact that he was persecuted for political *reasons*, even if such persecution was not directed against a political *group* and seeks to recover because the former was the real intent of the legislation. He cites *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284; *People of Puerto Rico* v. *Shell Co.*, 302 U.S. 253; *Rector, etc. of Holy Trinity Church* v. *United States*, 143 U.S. 457, *Markham* v. *Cabell*, 326 U.S. 404 and *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, to the effect that we are not always confined to a literal reading of a statute in construing it but may and should consider its object and purpose so as to effectuate rather than destroy its spirit and force which the legislature intended to enact.

The arguments of the claimant appear quite persuasive to me. The Chief of the Claims Section, however, contends that the Director has already considered these arguments and rejected them in the *Matter of Walter Lutz*, Title Claim No. 42142, Docket No. 55 T 75, decision of the Hearing Examiner dated September 30, 1955, pet. for rev. den. April 2, 1956. In that case, the Hearing Examiner found that a German physicist who was anti-Nazi was refused a civil service teaching position because he was not a member of the Party or of its affiliates. These circumstances alone were found insufficient to base a finding of a political group within the meaning of § 32. In the present case, claimant was offered Party membership. He declined although he knew he would be disqualified from practicing his profession. However "large and

amorphous" (to use the language in the *Matter of Mathilde Dietrich,* Title Claim No. 37849, Docket No. 1645, decision of the Director dated August 11, 1955) the group of non-Nazis and anti-Nazis were, the group of Germans who were offered the "privilege" of Party membership but who had the moral courage to reject the invitation even where such rejection labelled the rejector as "politically unreliable" must necessarily have been quite small. For that reason I do not believe the *Lutz* decision to be controlling.

I, therefore, conclude that:

1. Claimant, Walter Schilling, was resident within Germany on and after December 7, 1941.

2. Claimant is not entitled to the return of vested property under § 9 of the Act.

3. Claimant failed to enjoy full rights of German citizenship during the period of hostilities as a consequence of German laws, decrees or regulations discriminating against a political group, i.e., those who rejected an invitation to join the Nazi Party.

4. Claimant is eligible for the return of vested property under § 32 of the Act.

ACCORDINGLY, I recommend that Title Claim No. 37310, Docket No. 56 T 85 be allowed.

Harry R. Hinkes,
HARRY R. HINKES,
Hearing Examiner.

Dated: May 31, 1957.

---

2. DECISION OF DIRECTOR

This claim, which is for the return of the proceeds of vested property totalling approximately $68,000, is before me with a recommendation by the Hearing Examiner for allowance under section 32(a)(2)(D)

of the Trading with the Enemy Act, as amended (50 U.S.C. App. 32(a)(2)(D). A review of the record in this case compels me to reject the Examiner's recommendations and to disallow this claim.

The pertinent facts are as follows:

1. Claimant, Walter Schilling, was born in Bremen, Germany, in 1910. He has always been a citizen and resident of Germany.

2. The vested property from which the proceeds herein claimed were derived was owned by the claimant immediately prior to vesting.

3. Claimant was opposed to the principles of Nazism, and, in 1937, refused an invitation to join the Nazi party.

4. In 1934 claimant received a law degree from the University of Munich and thereafter served until 1939 (except for a one year period) as a "referendar" (young barrister attending the courts to qualify for admission to the bar) in the courts of Bremen. In 1939, claimant became eligible to take his final examination for admission to the legal profession. At that time the chairman of the examining board in Bremen was a prominent Nazi who would not pass any applicant who was not a member of the Nazi party or one of its affiliated organizations. The chairman refused to pass claimant, giving as his reason: "very poor performance professionally in the major task and two examination papers and in the oral examination. Politically completely passive." During the oral interview required of all candidates, the chairman informed the claimant that it would be useless for him to pass the examination since he had not joined a Nazi organization and thereby had placed himself outside the community of the German people.

5. After failing his final examination in 1939 claimant served an additional six months as a refer-

endar in the Bremen courts. He took the final examination for the second time in March 1940 before another chairman of the examining board who passed him. During the oral interview, however, this chairman told claimant that he could not hope for a career if he did not belong to the Nazi party or an affiliated organization.

6. An applicant for admission to the bar at the time claimant became eligible to apply for admission (and until after the cessation of hosilities) was, as a practical matter, required to be a member of the Nazi party or an affiliated organization. In view of this requirement, claimant, knowing that he would not be licensed without such membership, did not apply for permission to practice law after passing his examination. Instead he served as a legal clerk in a Bremen law firm until 1942 and in that year he went to work for a German industrial firm in a legal capacity where he was employed until the end of hostilities. Thereafter, claimant applied for admission to the bar and was licensed to practice law in 1946.

As a wartime citizen and resident of Germany, claimant is ineligible for the return of vested property unless he qualifies under the first proviso of section 32(a)(2)(D) of the Trading with the Enemy Act as

> an individual who, as a consequence of any law, decree, or regulation of [Germany] discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation.

The claimant argues that since the Weimar Constitution guaranteed all qualified applicants the right to a

license to practice law, the Nazi government's abrogation of that right was a substantial deprivation of the rights of German citizenship within the meaning of the above-quoted proviso. There is no doubt that claimant and his fellow German nationals who lived under the Nazi regime were deprived of most of the civil rights which had been granted by the Weimar Constitution. However, this general deprivation of rights cannot properly be held to afford the basis for relief under the first proviso of section 32(a)(2)(D). To construe the proviso in this way would produce the absurd result of making eligible for return every German claimant who was born prior to the advent of the Nazi regime. The language of the proviso is plainly not open to that construction and its clear intent is to make eligible for return only those German nationals who, as a result of laws or decrees discriminating against political, racial or religious groups, enjoyed rights of citizenship after December 7, 1941, substantially inferior to the *contemporary rights of German citizens generally*. See *Matter of Kashiro Maeda*, Title Claim 45628, Decision of Director, February 3, 1954, where I stated:

> * * * The Congress which enacted the law was well aware that our enemies in the war were dictatorships, in which the civil rights of the common citizen were few, and that life during the war years was hard for all but the favored classes. These circumstances were not made the tests of eligibility for return; if they had been, practically the entire population of the enemy countries would be eligible for return. * * * The return provided by the first proviso of Section 32(a)(2)(D) was an act of grace, limited to the persecuted minorities who suffered so grievously at the hands of enemy governments. * * * The tests prescribed by Congress for eligibility for return as a member

> of this limited class were definite, clear and strict. For an enemy national to qualify under the proviso it must be clear that, at all times after December 7, 1941, the *claimant was deprived of the rights of citizenship commonly enjoyed by other inhabitants of the country,* * * *." [Italics added.]

See also *Matter of Hermann Winter,* Title Claim 45960, Recommended Decision of Hearing Examiner adopted by Deputy Director January 25, 1956, which involved the claim of a German school teacher who was dismissed because of non-membership in a Nazi organization. In that decision it was stated:

> To be eligible under this section of the Act [section 32] a claimant must show that the civil rights of which he was deprived were generally available to the majority of German citizens. The loss of privileges available only to members of the Nazi party is not a denial of civil rights within the meaning of section 32(a)(2)(D).

Even if it were to be assumed that denial of a license to practice law deprived claimant of full rights of citizenship, his claim must be disallowed for the reason that he was not a member of a political, racial or religious group that was discriminated against. Anti-Nazis and non-Nazis do not constitute a political group. *Matter of Mathilde Dietrich,* Claim 37849, Decision of Director, August 11, 1955; *Matter of Walter Lutz,* Claim 42142, Hearing Examiner's decision September 30, 1955, petition for review denied by Director April 2, 1956; *Matter of Heinrich Georg Lutz,* claim 42143, Hearing Examiner's recommended decision adopted by Director June 22, 1956. As was stated in the *Dietrich* claim, *supra,*

> neither the language nor the legislative history of section 32 indicates that Congress intended

> the phrase "political groups" to include a body of individuals so amorphous and so large as that described by the Hearing Examiner [German citizens present in Germany during the war, who were not Nazi sympathizers and who opposed Nazism].

In *Matter of Walter Lutz, supra*, a case which is indistinguishable from the instant matter, I disallowed the claim of an anti-Nazi physicist with two graduate degrees who was barred from the teaching profession in Germany because he was not a member of the Nazi party or one of its affiliated organizations of teachers. The disallowance was based on a holding that anti-Nazi graduate physicists so barred from the teaching profession did not constitute a political, racial or religious group within the purview of section 32(a)(2)(D) of the Act. See also *Matter of Hermann Winter, supra.*

Based upon the foregoing findings of fact and the record, I conclude that:

1. Claimant was a wartime resident of Germany and thus, as an enemy under section 2(a) of the Trading with the Enemy Act, as amended, is ineligible for the return of vested property under section 9(a); and

2. Claimant does not qualify for return under the standards of the first proviso of section 32(a)(2)(D).

ACCORDINGLY, Title Claim 37310 is hereby disallowed.

(Signed) Dallas S. Townsend,
DALLAS S. TOWNSEND,
Assistant Attorney General,
Director, Office of Alien Property.

APRIL 2, 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958

SUPREME COURT OF THE UNITED STATES

No. 319.—October Term, 1959.

Walter Schilling, Petitioner, v. William P. Rogers, Attorney General.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 20, 1960.]

Mr. Justice Harlan delivered the opinion of the Court.

Section 32 (a) of the Trading with the Enemy Act (added by 60 Stat. 50 as amended, 50 U. S. C. App. § 32 (a)) authorizes the return in certain circumstances of property vested by the United States during World War II. Under that provision:

> "The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine . . ."

that the following conditions are met: (1) the claimant was the owner of the property in question prior to its vesting, or is the legal representative or successor in interest of the owner;[1] (2) he was not a member of any of several

[1] § 32 (a) (1): "That the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner . . ."

excluded classes, summarized in the margin; [2] (3) the property was not used pursuant to a "cloaking" arrangement, whereby the interest of an ineligible person in the property was concealed; [3] (4) there is no danger of liability in respect of the property attaching to the Custodian under the renegotiation statutes; [4] and (5) "such return is in the interest of the United States." [5]

The particular provision involved in this case is paragraph 2 (D) of § 32 (a), which makes ineligible citizens of certain enemy countries who were present in those countries after the onset of hostilities, and its first proviso

[2] § 32 (a) (2) disqualifies: (A) the Governments of Germany, Japan, Bulgaria, Hungary, and Rumania; (B) corporations or associations organized under the laws of such nations; (C) persons voluntarily resident since Dec. 7, 1941, in any such nation, other than American citizens, certain diplomatic officers, or certain persecuted persons; (D) citizens of such nations, other than certain persecuted persons, who were present or engaged in business there between Dec. 7, 1941, and Mar. 8, 1946; and (E) certain foreign corporations or associations which, after Dec. 7, 1941, were controlled by persons falling within the above categories.

[3] § 32 (a) (3): "that the property or interest claimed, or the net proceeds of which are claimed, was not at any time after September 1, 1939, held or used, by or with the assent of the person who was the owner thereof immediately prior to vesting in or transfer to the Alien Property Custodian, pursuant to any arrangement to conceal any property or interest within the United States of any person ineligible to receive a return under subsection (a) (2) of this section . . . ."

[4] § 32 (a) (4): "that the Alien Property Custodian has no actual or potential liability under the Renegotiation Act or the Act of October 31, 1942 (56 Stat. 1013; 35 U. S. C. §§ 89–96), in respect of the property or interest or proceeds to be returned and that the claimant and his predecessor in interest, if any, have no actual or potential liability of any kind under the Renegotiation Act or the said Act of October 31, 1942; or in the alternative that the claimant has provided security or undertakings adequate to assure satisfaction of all such liabilities or that property or interest or proceeds to be retained by the Alien Property Custodian are adequate therefor . . . ."

[5] § 32 (a) (5).

(added by 60 Stat. 930), which exempts from that ineligibility certain persons who were the victim of persecution.[6] The question for decision is whether the District Court had jurisdiction to review a determination of the Director, Office of Alien Property, sanctioned by the respondent Attorney General, holding this proviso inapplicable to the facts presented by the petitioner's claim.[7]

Petitioner, a national and resident of Germany at all material times, duly filed with the Attorney General a claim under the § 32 (a)(2)(D) proviso for the return of the proceeds of certain property vested by the respondent's predecessors in 1942, 1947, and 1948, asserting an interest therein of some $68,500. He alleged that throughout the relevant period he, as an "anti-Nazi," claimed to have been a discriminated-against political group, had been deprived of full rights of German citizenship, in that he had been denied admission to the practice of law. A Hearing Examiner recommended allowance of the claim, but his recommendation was rejected by the Director on

---

[6] § 32 (a)(2)(D) disqualifies: "an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the provisions of this subdivision return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation . . . ."

[7] On May 16, 1946, the President delegated his functions under § 32 (a) to the Alien Property Custodian. Exec. Order No. 9725, 11 Fed. Reg. 5381. On Oct. 15, 1946, the functions of the Custodian were transferred to the Attorney General. Exec. Order No. 9788, 11 Fed. Reg. 11981.

the ground that petitioner was ineligible for relief under the § 32 (a)(2)(D) proviso.* The Attorney General refused review. Petitioner then sued in the District Court to review the administrative determination, claiming it to have been arbitrary and illegal. The court denied the Government's motion to dismiss the complaint for want of jurisdiction. The Court of Appeals reversed, holding, in line with its own prior course of decisions, that judicial review of the administrative disposition was precluded by § 7 (c) of the Trading with the Enemy Act. 268 F. 2d 584. Because of the importance of the question in the proper administration of the Trading with the Enemy Act we brought the case here. 361 U. S. 874. For reasons given hereafter we affirm the judgment below.

Petitioner's principal reliance is upon § 10 of the Administrative Procedure Act which provides for judicial review of agency action "[e]xcept so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." 60 Stat. 243, 5 U. S. C. § 1009. We find that both such limitations are applicable here.

Section 7 (c) of the Act provides:

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter . . . transferred . . . to the Alien Property Custodian . . . shall be that provided by the terms of this Act . . . ."

---

* The Director stated the essence of his decision as follows: "Even if it were to be assumed that denial of a license to practice law deprived claimant of full rights of citizenship, his claim must be disallowed for the reason that he was not a member of a political, racial or religious group that was discriminated against. Anti-Nazis and non-Nazis do not constitute a political group." (Citing past administrative decisions.)

We perceive no basis for petitioner's contention that § 7 (c) limits only the remedies available to nonenemies under § 9 (a), or for construing § 7 (c), passed in 1918, as not being applicable to § 32, passed in 1946. The language of the section is "all-inclusive," *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79, and it speaks to the future as well as the past. See also *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 568.

The only express provision in the Trading with the Enemy Act for recourse to the courts by those claiming the return of property vested during World War II is that contained in § 9 (a). That section, however, is applicable only to persons not enemies or allies of enemies as defined in the relevant statutes, and hence is not available to this petitioner, an enemy national.[2] While § 9 (c) also entitles certain classes of "enemies" enumerated in § 9 (b) similarly to sue in the courts to recover vested property whose return is authorized under § 9 (b), those sections apply only to World War I vestings. See *Feyerabend* v. *McGrath*, 189 F. 2d 694; cf. *Markham* v. *Cabell*, 326 U. S. 404. Although § 32 (a) broadened the categories of those having an enemy status who were eligible for the return of property vested during World War II, unlike § 9 (c) it contains no express provision for judicial relief in respect of such claims.

The question then is whether a right to such relief can fairly be implied, for we shall assume that if such be the

[2] Section 9 (a) authorizes "[a]ny person not an enemy or ally of enemy" (defined in § 2 of the Act, as supplemented by the First War Powers Act of 1941, 55 Stat. 838) to sue in equity for the return of vested property in which he claims an interest, either in the District Court for the District of Columbia or in the District Court of the district in which the claimant resides. 40 Stat. 419, as amended, 50 U. S. C. App. § 9 (a). As a German national and resident, petitioner is concededly an "enemy" under the statute.

case the requirements of § 7 (c) would be satisfied. The terms of § 32 and its legislative history speak strongly against any such implication. The absence in § 32 of any provision for judicial relief respecting "enemy" claims for the return of property vested during World War II stands in sharp contrast to the presence of such a provision in § 9 (c) with respect to certain enemy claims arising out of World War I vestings. The original version of what ultimately became § 32 did contain a provision for judicial relief comparable to that in § 9 (c), not applicable, however, to property of enemy national-residents, as well as a "sole relief and remedy" provision comparable to that in § 7 (c)—H. R. 4840, § 32 (b), (c), in Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives on H. R. 4840, 78th Cong., 2d Sess., pp. 1–2—but the subsequent draft of the bill, substantially in the form as finally enacted in March 1946 (60 Stat. 50), omitted both provisions. See H. R. 3750, in Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 3750, 79th Cong., 1st Sess., pp. 1–2. While the legislative record contains no explanation for these omissions, the committee hearings on H. R. 3750 and those on subsequent amendments to the Act preclude the view that it was contemplated that persons having an enemy status, still less those who were nationals and residents of enemy countries, should have the right of recourse to the courts with respect to administrative denials of return claims.

Speaking to H. R. 3750 at the initial committee hearing, Mr. Markham, then Alien Property Custodian, stated:

> "I want to be sure I make this clear. Supposing a person applies to the Custodian for the return of a property, and for reasons that I deem appropriate under the bill I refuse to return the property. Now, we will say that this person would have to be a tech-

nical enemy, a Frenchman. He has no right to compel me to return it under this bill." Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 3750, 79th Cong., 1st Sess., p. 14; see also pp. 11, 15.

And when a few months later, in August 1946, various amendments to the statute were considered and the § 32 (a)(2)(D) proviso was added (60 Stat. 930), § 32 came under severe criticism because of the absence of provisions for judicial relief in respect of return claims by technical enemies. See Hearings before a Subcommittee of the Senate Committee on the Judiciary, on S. 2378 and S. 2039, 79th Cong., 2d Sess., pp. 57–59, 61, 62–63. The affording of such relief to enemy nationals was, however, at no time suggested. Congress, nevertheless, permitted § 32 to stand without enacting provisions for such judicial relief,[10] and later proposed legislation of that character also failed of enactment. See S. 2544, 82d Cong., 2d Sess.; S. 34, 83d Cong., 1st Sess.[11]

[10] At the same time, however, Congress enacted other provisions relating to judicial remedies, § 33 providing a statute of limitations on the commencement of suits under § 9, and § 34 providing for judicial review of administrative determinations on debt claims allowable out of vested property (60 Stat. 925). In connection with the former section there was spread in Congressional Record, with the approval of the Chairman and Ranking Member of the House Judiciary Committee, a letter from the Custodian stating his understanding that "this amendment is not to be regarded as implying that there is judicial review under section 32." 92 Cong. Rec. 10486. Similarly, in connection with the enactment of § 32, a few months before, Congress had added to the Act § 20 providing for judicial review of administrative allowances of counsel fees in return proceedings before the Custodian, 60 Stat. 54. See also S. Rep. No. 920, 79th Cong., 2d Sess., p. 7.

[11] More particularly with reference to the § 32 (a)(2)(D) proviso, neither the Committee hearings preceding its enactment, see Hearings before a Subcommittee of the Senate Committee on the Judiciary, on S. 2378 and S. 2039, 79th Cong., 2d Sess.; cf. Hearings before Sub-

The conclusion which the history of § 32 impels is confirmed by the text of the section and other provisions of the Act. The absence of any provision for recourse to the courts in connection with § 32 (a) return claims contrasts strongly with the care that Congress took to provide for and limit judicial remedies with respect to other aspects of the section and other provisions of the Act. See, *e. g.*, §§ 32 (d), 32 (e), 32 (f),[12] 33, 34 (e), 34 (f), 34 (i). It is not of moment that these provisions concerned direct judicial relief, and not court review of denials of administrative relief. The point is that in this Act Congress was advertent to the role of courts, and an absence in any specific area of any kind of provision for judicial participation strongly indicates a legislative purpose that there be no such participation. Beyond this, the permissive terms in which the § 32 return provisions are drawn (*ante*, p. ——) persuasively indicates that their administration was committed entirely to the discretionary judgment of the Executive branch "without the intervention of the courts." See *Work* v. *Rives*, 267 U. S. 175, 182.

---

committee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 5089, 79th Cong., 2d Sess., nor later Senate or House Reports referring to the proviso—see S. Rep. No. 784, 81st Cong., 1st Sess.; H. R. Rep. No. 2338, 81st Cong., 2d Sess.; S. Rep. No. 600, 82d Cong., 1st Sess.; Final Report of the Subcommittee on Administration of the Trading with the Enemy Act, Senate Committee on the Judiciary, pursuant to S. Res. 245, 82d Cong., 2d Sess., as amended by S. Res. 47, and S. Res. 120, 83d Cong., 1st Sess. —— contain any suggestion that judicial review was contemplated in connection with such claims.

[12] This section, which requires the Custodian to publish in the Federal Register a 30-day notice of his intention to return vested property to claimants other than residents of the United States or domestic corporations, provides that publication of such notice "shall confer no right of action upon any person to compel the return of any such property," and further that any such notice may be revoked by the Custodian by appropriate publication in the Federal Register.

Petitioner, however, relying on *McGrath* v. *Kristensen*, 340 U. S. 162, contends that even though he might not be entitled to judicial review of an adverse administrative determination on the *merits* of his claim, he is nonetheless entitled to such review on the issue of his *eligibility* under the § 32 (a)(2)(D) proviso, the only issue here involved. The *Kristensen* case, involving eligibility for suspension of deportation under § 244 of the Immigration and Nationality Act (66 Stat. 214, 8 U. S. C. § 1254), bears little resemblance to the situation involved here. See *Heikkila* v. *Barber*, 345 U. S. 229, 233; *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301. The structure of § 32 (a) does not permit of any such distinction in this case. Compare H. R. 4840, 78th Cong., 2d Sess., § 32 (a). Indeed, it is not certain whether petitioner's theory of partial reviewability would apply only to the proviso with which he is concerned; to all of paragraph (2), but only to that paragraph; or to paragraphs (1), (3), and (4) as well (see pp. —, and Notes 1–4, *ante*). None of these alternatives is acceptable. As to the first and second, no reason appears why either of these categories should be singled out for special treatment, while the third would make reviewable determinations which involve factors with which only the Executive branch can satisfactorily deal. See, *e. g.*, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 3750, 79th Cong., 1st Sess., p. 4 (proof of pre-vesting ownership); Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 5089, 79th Cong., 2d Sess., p. 37 (proof of "cloaking" arrangements). Beyond that, we think the congressional decision to spell out in some detail certain limitations on the power it was conferring on the Executive was not designed to bestow rights on claimants, arising out of an assertedly too-narrow reading by the Executive of the

discretionary power given him. Rather we consider the specifications of paragraphs (1) through (4) as designed to provide guides for the Executive, thereby lessening the administrative burden of decision. See Hearings before Subcommittee No. 1 of the Senate Committee on the Judiciary, on S. 2378 and S. 2039, 79th Cong., 2d Sess., p. 19.

We conclude that the Trading with the Enemy Act excludes a judicial remedy in this instance, and that because of this, as well as because of the discretionary character of the administrative action involved, the Administrative Procedure Act, by its own terms (*ante*, p. ——), is unavailing to the petitioner.[13]

Petitioner's other contentions may be dealt with shortly. It is urged that judicial review is in any event available because the complaint, whose allegations as the case comes here must be taken as true, alleges that the administrative action was arbitrary and capricious. However, such conclusory allegations may not be read in isolation from the complaint's factual allegations and the considerations set forth in the administrative decision upon which denial of this claim was based. See *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 401. So

[13] The fact that in a third-party suit affecting returned property, the courts must, in accordance with § 32 (e), determine, if relevant, the claimant's eligibility under the § 32 (a) (2) (D) proviso, does not militate against this conclusion. First, it is far from clear that in such circumstances the doctrine of primary jurisdiction would not call for a referral of that issue to the Attorney General. Cf. *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Far East Conference* v. *United States*, 342 U. S. 570; *Maritime Board* v. *Isbrandtsen*, 356 U. S. 481, 496–498. Moreover, even if necessity compelled judicial determination in suits between private parties of the issue ordinarily disposed of under § 32 (a), we would not be justified, in the context of the other provisions of this statute, in inferring from that a congressional willingness to have Executive determinations reviewed in court.

read, it appears that the complaint should properly be taken as charging no more than that the administrative action was erroneous. This is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers, where the availability of judicial review would be attended by quite different considerations than those controlling here. Cf., *e. g., Accardi* v. *Shaughnessy*, 347 U. S. 260; *Leedom* v. *Kyne*, 358 U. S. 184.

Finally, petitioner's reliance on the Declaratory Judgment Act carries him no further. Section 7 (c) of the Trading with the Enemy Act embraces that form of judicial relief as well as others. Additionally, the Declaratory Judgment Act is not an independent source of federal jurisdiction, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 671; the availability of such relief presupposes the existence of a judicially remediable right. No such right exists here.

We conclude that the Court of Appeals correctly held that the District Court lacked jurisdiction over this action, and that its judgment must be

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 319.—October Term, 1959.

Walter Schilling, Petitioner, v. William P. Rogers, Attorney General.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 20, 1960.]

Mr. Justice Brennan, with whom The Chief Justice, Mr. Justice Black, and Mr. Justice Douglas join, dissenting.

This Court has gone far towards establishing the proposition that preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. See *Leedom* v. *Kyne*, 358 U. S. 184; *Harmon* v. *Brucker*, 355 U. S. 579; *Stark* v. *Wickard*, 321 U. S. 288; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. Generalizations are dangerous, but with some safety one can say that judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated.[1] To be sure, a clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose; though *Leedom* v. *Kyne*, *supra*, where I thought nonreviewability proved from the congressional purpose, shows that the Court is far from quick to draw such a conclusion. I cannot agree that the statute here gives any clear direction that this administrative determination that as a matter of law petitioner was ineligible for the exercise of discretionary relief under § 32 (a) should not be reviewable by the courts. Questions as to the scope of that review, of course, are not now before us; simply whether the power exists at all.

[1] See Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 401, 432

Section 7 (c) of the Act states that the Act's remedies shall be "the sole relief and remedy" of claimants of vested property, and, to be sure, this language is "all-inclusive." *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79. Let us, then, take a close and fully-focused look at what those remedies include, and compare them with what petitioner seeks.

Section 9 (a) of the Act, under which petitioner of course makes no claim, provides a judicial remedy for those who are not enemies and not allies of enemies; they may sue in equity for the return of their property.[2] Sec-

[2] In pertinent part, § 9 (a) provides:

"(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to

tion 9 (c) gives the same remedy to certain classes of enemies.[3] But it is apparent from both these provisions that they contemplate an independent judicial remedy—a suit to return property; not an action to review certain determinations of administrative officers. There is not even a provision that application must be made for administrative relief before suit is brought. There simply is a requirement for the filing of a notice of claim, which the statute clearly distinguishes from making an application for an administrative return, the latter being optional. *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215; *Duisberg* v. *Crowley*, 54 F. Supp. 365. See *Stoehr* v. *Wallace*, 255 U. S. 239, 246. Even where the applicant chooses to seek an administrative return, suit may be instituted

---

which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. . . ." 40 Stat. 419, as amended, 50 U. S. C. App. § 9 (a).

[3] Section 9 (c) provides:

"(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof." As added, 41 Stat. 980, as amended, 50 U. S. C. App. § 9 (c).

The relevant classes of enemies are set forth in § 9 (b). Petitioner makes no claim under § 9 (c).

before the administrative action is completed. The administrative remedy and the judicial remedy are each completely independent of the other; Congress has made this clear even to the extent of putting an "and or" on the statute books. In no sense, then, can the independent judicial remedy of § 9 be said to be a judicial review of administrative action. It is independent of any administrative action's being taken. It requires the courts to make a plenary, *de novo* adjudication of all the controverted issues as they would in any lawsuit between citizens.

Section 32 (a), under which petitioner has applied for relief, on the other hand provides simply for an administrative remedy. That it does, of course, under § 7 (c) precludes the inference of any independent judicial remedy such as § 9 provides. But there is no reason why it should preclude the inference that administrative action taken under it should be subject to judicial review. The courts have developed many principles defining and limiting the quantum of judicial review that may be afforded administrative adjudication. This generally narrow character of judicial review, in contrast to an independent lawsuit directed at the same end as an administrative adjudication, points up the distinction between the independent action under § 9 and what is contended for here. In the latter, the courts cannot order the return of the property. They simply may say that the administrator cannot stand on the ground he gave for not returning it. See *Greene* v. *McElroy*, 360 U. S. 474, 510 (concurring opinion). The former is clearly precluded, but the latter hardly is. The approach to interpretation that cases like *Kyne*, *Harmon* and *Stark* symbolize should indicate that judicial review of the administrative action under § 32 (a) is available. Section 7 (c) is by no means offended by this since this construction recognizes that the sole remedy under § 32 (a) is administrative in nature, but attaches

to that administrative remedy the general attribute of administrative remedies in our system—judicial review.

The Court points to the legislative history of § 32 (a) as indicating a contrary conclusion. It says that a judicial remedy was originally provided for in early versions of the bill which added § 32 (a) to the statute, but that the final enactment omitted it. This would be very relevant if what had been originally contained in the bill had been a provision for judicial review of action taken under § 32 (a), such as what petitioner now contends is implicit. But it was not; it was rather a provision for an independent judicial remedy, patterned entirely in the style of § 9.[1] That it was omitted of course adds another proof that there can be no independent judicial action to get a return under § 32 (a); but it does not tell us that normal judicial review into administrative action under § 32 (a) is to be foreclosed. Mr. Markham's remarks, quoted by the Court, are of course explicable on the ground that there was no counterpart of § 9's provision for an independent lawsuit in § 32 (a). In fact, they were spoken in response

[1] In fact, the independent judicial remedy was not even put *in pari materia* with the administrative remedy under § 32 (a). It simply provided:

"After filing a claim with the Alien Property Custodian pursuant to subsection (a) hereof, a claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Custodian shall be made a party defendant), to establish that he is not a foreign country or national thereof as defined pursuant to subsection (b) of section 5 hereof, and to establish the interest, right, or title claimed. The claimant shall obtain a judgment or decree ordering the return to him of the interest, right, or title to which the court shall determine he is entitled, but only if the court shall adjudicate that he is not a foreign country or national thereof. . . ." § 32 (b), H. R. 4840, in Hearing before Subcommittee No. 1, Committee on the Judiciary, House of Representatives, on H. R. 4840, 78th Cong., 2d Sess., pp. 1–2.

to a question whether "the individual whose property has been taken or affected can appeal to the courts of the land to have his equity determined?" Hearing before Subcommittee No. 1, Committee on the Judiciary, House of Representatives, on H. R. 3750, 77th Cong., 1st Sess., p. 13. The question is a good description of the functions of courts under § 9. It does not describe the functions of courts exercising a review function of administrative action under § 32 (a). The subsequent legislation which the Court mentions as having failed of passage, S. 2544, 82d Cong., 2d Sess.; S. 34, 83d Cong., 1st Sess., was not legislation to provide judicial review, but to afford an independent judicial remedy similar to § 9.[5] Thus it is apparent that the alternative that was presented to Congress and rejected clearly enough was not ordinary judicial review of determinations under § 32 (a), but independent judicial action of a sort comparable to § 9's.

The Court does not demonstrate any policy on which Congress may have been acting and from which it might be inferred that judicial review was impliedly precluded under § 32. Congress clearly precluded independent lawsuits, but there is no demonstration that it acted in pursuance of any purpose which would be broad enough impliedly to negate judicial review of administrative action as well. So there is no reason why the general principle should not apply: "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon* v. *Brucker*, *supra*, at 581–582.

[5] This legislation seems to have contemplated a judicial remedy much broader than that of the early provisions before the addition of § 32, see note 4, *supra*. The bills covered "any person eligible for a return under this section" (§ 32) and provided that such a person, after filing a notice of claim, might "institute a suit in equity to recover such money or other property in the manner provided by subsection 9 (a) hereof and with like effect."

There is then clearly established jurisdiction to review under the general principles which find expression in § 10 of the Administrative Procedure Act; the statute does not "preclude judicial review." 60 Stat. 243, 5 U. S. C. § 1009. But the Court also holds that, within the meaning of § 10, "agency action is by law committed to agency discretion." Since want of jurisdiction in the District Court is found, I take it the Court holds that the question, review of which is now sought, which is an issue of statutory construction, is totally and exclusively for the administrative officers to determine—not simply that the courts are to give their determination of this question of law considerable weight. Cf. *Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130; *Gray* v. *Powell*, 314 U. S. 402, 411. Once it is established that the statute does not preclude judicial review, this conclusion seems to me untenable. The issue is a question of law; the construction of a detailed and moderately specified standard. It is not like the ultimate determination that the return be "in the interest of the United States," § 32 (a)(5), which is clearly where the ultimate reservoir of discretion lies under § 32 (a). This determination was never reached. We need not speculate about the breadth of judicial inquiry in judicial review where the administrative decision not to return the property is based on that ground, or is based on one of the other grounds under the statute. The quantum of review can be adjusted to the problem before the courts. Here the determination not to return was based on a holding that petitioner did not come within the first proviso to § 32 (a)(2)(D). The proviso's terms were viewed administratively not as guides to an administrative discretion but as legal standards. Under commonplace principles, the determination must stand or fall on that basis. It may be that the novelty of the standards of that proviso (see Subcommittee Hearings, Senate Committee on the Judiciary, on S. 2378 and

S. 2039, 79th Cong., 2d Sess., p. 19) should teach the courts to give considerable weight to the administrative construction of the law. But that is not to say, as the Court does, that it is so much a matter of administrative discretion as to preclude judicial review.[6] To my mind, *McGrath* v. *Kristensen*, 340 U. S. 162, is squarely in point. There there was a statute which bristled with discretion as much as this one. But where the administrative decision under it was not rendered on the basis for the exercise of discretion the statute provided, but as a matter of law, judicial review was available. We retreat from established principles of administrative law when we say it is unavailable here. The judgment of the Court of Appeals should be reversed, and the order of the District Court declining to dismiss the complaint for want of jurisdiction should be affirmed.

[6] One of the grounds on which the administrative officials may decline return under § 32 (a) is that the claimant was not the owner of the property at the time it was vested, or the successor thereof. § 32 (a)(1). Is this simply to be deemed a guide to the administrative discretion in granting returns, or a legal standard?